88-143

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PHILADELPHIA, and
JAMES STANLEY WHITE, in his capacity as
MANAGING DIRECTOR, and
WILLIAM J. MARRAZZO, in his capacity as
WATER COMMISSIONER,

Petitioners,

v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SEYMOUR KURLAND, CITY SOLICITOR
A Member Of The Bar Of This Court
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Counsel for Petitioners.

QUESTIONS PRESENTED

1. Whether the action of an administrative agency, which the agency admits contravenes its statutory mandate, can provide the basis for federal subject matter jurisdiction in a citizen enforcement suit under the Clean Air Act?

2. Whether the District Court, after the merits trial, can, *sua sponte,* assert subject matter jurisdiction based on the common law of nuisance when there exists no substantial federal claim and where no such pendent state claim had been alleged by plaintiffs?

3. Whether the District Court can employ equity, in a case decided on common law nuisance, to do that which is specifically prohibited by the Pennsylvania Political Subdivision Tort Claims Act?

4. Whether a District Court can assess compensatory damages, where the court itself admits there is no evidence of damages?

LIST OF PARTIES

The parties to the proceedings before the United States Court of Appeals for the Third Circuit were appellants, the City of Philadelphia, James Stanley White, in his capacity as Managing Director; and William J. Marrazzo, in his capacity as Water Commissioner; and appellees, the Concerned Citizens of Bridesburg; James Coppola; Robert Kumosinski; Mia Ptak; Kathleen Coppola; Harry Hagendey; Kathleen Hagendey; Elizabeth Rickey; Frances Pfeiffer; Joseph Pfeiffer; Edward Ludigan; Anthony Les; Ethel R. Mitchell; Charles A. Finnegan; Michael Butler; Al Lewandowski; Linda Lewandowski; Karen Dylinski; Charles H. Combs; Ethel Marinuk; Karen Arenweh; Cecilia Pawlowska; Delores Short; Vincent Dombrowski; Barbara Lynn Portoni; Mary Elton; Ruth C. Groff; Anna-May Burns; Edna Donachie; Edna Kingston; Dennis J. Foster; Kelly Charlton; Mark D. Haug; Tillie Piergrossi; Joe Larsen; Sue Larsen; John Waters Auto Sales; Rich Sileo; Agnes Antonelli; Albert Mantici; Robert J. Portone; Thelma Schmidt; Betty Long; Mark Fronceh; Toni Francek; Bill Conceptal; Del Conceptal; Linda Wolk; Clair Fern; Pearl McGovern; Louis Kozlowski; Gelwin Pusicz; Joyce Ripso; Stacey Southerland; Tina Auerweck; Elizabeth Auerweck; Ernest Marinuk; T. Yodin; Cynthia Moscicki; James O. Respo; Marie Gorski; Florence James; Joel James; Angel Romer; Stephanie Novak; Nellie Novak; Sue O'Donnell; Bill O'Donnell; Edward Pihala, Sr.; John McLaverty; Bennett Hill; Anthony Calo; C. William; Robert Flanagen; Bobby Rekala; Maureen Kumosinski; Anna M. Pawloski; Stanley M. Pauloski; Michael M. Lisicki; Linda A. Lisicki; Emily Kumosinski; Nancy McMaster; Frank Kumosinski; Andy Palka; Amey E. Howard; Katherine Coppola; Josephine Gordon; Anna Konopka; Arlene Kurpaska; John Pendergrast; Betty Pendergrast; Phil Lerman; Esther Lerman; Linda Flynn; Virginia Wagner; Pauline James; Justine Hayes; Peter Bingel; Joan Bingel; Michael Parcale; Helen Mason; Florence Peoccaineri; William Malloy; William R. Hood; Herb Rorenberger; William Moronese; Jack Renfe; Perry M. Smith; John

Svitak; John Atkinson; Michael H. Stark; Wendy Prince; Delores Berger; Stanley Berger; Betty Higham; Mary Lucy Collins; Ronnie Kirby; Mary Gogoj; William Melley; Ellen Casey; Sharon Gibson; Lise Cuich; Linda Froncek; Rita Palka; Jacqueline Parttezzia; Walter Kozlowski; Christina Serpico; Eleanor McKinley; Stephie Byrme; Shen Turner and Mary Yoder.

In the proceedings before the United States District Court for the Eastern District of Pennsylvania, the parties included two additional entities: Rohm & Haas Corporation and Allied Corporation, defendant-intervenors. At the time the suit was commenced Leo A. Brooks was Managing Director. In addition the Philadelphia Water Department was dismissed as a plaintiff in the District Court.

The respondents before this Court include those named above as appellees in the proceedings before the United States Court of Appeals for the Third Circuit.

TABLE OF CONTENTS

TABLE OF CONTENTS—*(Continued)*

TABLE OF AUTHORITIES

Cases Cited: Page

TABLE OF AUTHORITIES—*(Continued)*

Cases Cited: Page

Cases Cited: Page

Federal Constitution, Statutes and Regulations:

TABLE OF AUTHORITIES—*(Continued)*

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Petitioners, the City of Philadelphia, James Stanley White in his capacity as Managing Director, and William J. Marrazzo in his capacity as Water Commissioner, respectfully pray that a writ of certiorari issue to review the judgment and opinion of the United States Court of Appeals for the Third Circuit, entered in the above-entitled proceeding on March 31, 1988, rehearing denied April 25, 1988.

OPINIONS BELOW

The opinion of the United States Court of Appeals for the Third Circuit is reported at 843 F.2d 679 (3d Cir. 1988), and is reprinted in the appendix hereto, p. A-1, *infra.*

The January 28, 1987 Memorandum Opinion and Order of the District Court (VanArtsdalen, J) has not been reported. It is reprinted in the appendix hereto. p. A-12, *infra.*

The July 25, 1986 Memorandum opinion and order of the United States District Court for the Eastern District of Pennsylvania (VanArtsdalen, D.J.) is reported at 643 F.Supp. 713 (E.D.Pa. 1986), and is reprinted in the appendix at p. A-24, *infra.*

JURISDICTION

The judgment of the Court of Appeals was entered on March 31, 1988; a timely petition for rehearing was denied on April 25, 1988.

The jurisdiction of this Court is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY AND REGULATORY PROVISIONS INVOLVED ARE SET FORTH IN THE APPENDIX

U.S. Const. Amend V.

Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a)

Section 304 of the Clean Air Act, 42 U.S.C. § 7604

50 Fed. Reg. 32451

51 Fed. Reg. 18438

Pennsylvania Air Pollution Control Act 35 P.S. § 4010(f)

Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. 8541 *et seq.*

STATEMENT OF CASE

Respondents, on January 3, 1985, initiated this action in the District Court solely on the basis of the citizen suit enforcement provisions of the Clean Air Act, 42 U.S.C. § 7604, p. A-47, *infra* to enforce the odor regulations which had been inadvertently approved by the United States Environmental Protection Agency ("EPA") for inclusion in the Pennsylvania State Implementation Plan ("SIP"). An amended complaint was filed on April 12, 1985, naming additional individuals as plaintiffs and correcting certain statutory citations. Both of these complaints are entitled "Citizen Lawsuit Complaint To Enforce Clean Air Act, 42 U.S.C. § 7401 *et seq*, In respect to the City of Philadelphia's Northeast Water Pollution Control Plant." The latter complaint merely added the word "Amended" to its title. At the oral argument held on respondents' motion for summary judgment, their counsel characterized the amended complaint as follows:

> Mr. Balter:
>
> This is a citizen lawsuit enforcement action to enforce the odor regulation in the Pennsylvania State Implementation Plan, a regulation under the Clean Air Act. The Citizen lawsuit is brought pursuant to section three zero four, [42 U.S.C. § 7604].

[Tr. Sept. 16, 1985 at 4].

The graveman of the two complaints was that the Northeast Water Pollution Control Plant ("the Plant"), which treats raw sewage prior to its discharge in the Delaware River, was emitting odors into the community adjacent to the Plant.

As an initial matter, petitioners raised the question of the District Court's jurisdiction over the subject matter of this action by means of a motion to dismiss the complaint, which motion was filed on January 31, 1985. The basis for the claim of lack of subject matter jurisdiction was premised upon the lack of the Congressionally-mandated nexus between the odor regulations and the national ambient air quality standards; that they had been improperly and inadvertently included in

the SIP; and that such inclusion, which contravened the Congressional mandate set forth in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a), was a nullity. Petitioners documented this position by producing to the District Court a copy of a letter dated April 1, 1983 from EPA to the Pennsylvania Department of Environmental Resources ("DER"), in which EPA advised DER that:

> Although EPA initially approved the odor regulations in 1972 as part of the basic SIP, this was an error. EPA does not have the authority to enforce odor regulations and we do not anticipate receiving such authority from Congress in the foreseeable future. Because of this, we have not and will not enforce the existing odor regulations.

[Exhibit "A" to Defendants' Reply to Plaintiffs' Memorandum In Opposition to Motion to Dismiss].

In light of the City's motion to dismiss, the trial court on February 19, 1985 issued an order that requested EPA to file an *amicus curiae* brief on this issue. On March 20, 1985, EPA did file an *amicus curiae* brief in which it acknowledged that Section 110(a)(2) of the Clean Air Act required EPA to approve as part of SIPs only those provisions which significantly contribute to the attainment and maintenance of the national ambient air quality standards ("NAAQS") and that the odor emission regulations bore no such relationship to the NAAQS. The agency also advised the court that:

> EPA recognizes the problem raised by its approval of the state odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which requires measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to approve a state rule as part of the SIP, the rule must significantly control emissions that contribute, directly or indirectly to concentrations of pollutants for which a NAAQS has been established. Yet the City of Philadelphia points out here, and EPA agrees, that

> the state odor emission regulations bear no relationship to the attainment or maintenance of any NAAQS.

[p. A-63, *infra*]. EPA further advised the trial court of its intention to delete the odor emission regulations from the Pennsylvania SIP. [pp. A-63–A-64, *infra*].

The motion to dismiss for, *inter alia*, lack of subject matter jurisdiction was denied by order dated April 25, 1985, in which the District Court substituted its own independent assessment of the relationship between the odor regulations and the NAAQS for that of EPA: "[t]he odor emission regulations at issue are 'more stringent than those necessary to meet the minimal requirements of the primary and secondary ambient air quality standards' " [April 25, 1985 Order at p. 16]. The District Court then held that the City had failed to show that the odor emission regulations were wholly unrelated to the NAAQS:

> Defendant City's motion to dismiss fails for the same reason as that articulated above. In order for the odor emission regulations not to be related in any way to the implementation of the ambient air quality standards, the City must show that odor emissions are wholly unrelated to the emission of any pollutants for which there are ambient air quality standards. Defendants have failed to show that the "malodorous air contaminants" proscribed in the state odor emission regulations, which are part of the SIP, are "wholly unrelated" to the emission of any "air pollutants" proscribed by the CAA [Clean Air Act].

[*Id.* at p. 18]

On August 12, 1985, EPA published in the Federal Register notice of its intent to delete the odor emission regulations from the Pennsylvania SIP. [p. A-73, *infra*]. An extended sixty-day public comment period was held.

Expressly because of the imminence of EPA's Final Rule deleting the odor emission regulations from the Pennsylvania SIP, respondents moved on March 21, 1986, to amend their complaint for a second time to include the organic solvent

provisions of Philadelphia Air Management Regulation V, Section X. The expressed purpose of this proposed amendment was so that the trial court might retain jurisdiction over the action.

Petitioners and defendant-intervenors opposed the motion on, among other grounds, that to allow such amendment would prove futile as the organic solvent regulations were not applicable to wastewater treatment plants and that the motion was not made in good faith because it was an attempt to manufacture federal jurisdiction in the absence of any legal foundation.

On April 22, 1986, the District Court, despite being "inclined to agree with defendants' interpretation [of the inapplicability] of the regulation," granted Appellees' motion to amend. However, no such amended complaint was ever filed.

The Final Rule, deleting the Pennsylvania SIP, was signed on Friday, May 2, 1986 by Lee M. Thomas, EPA's Administrator, and was published in the Federal Register on May 20, 1986 [p. A-77, *infra*].

In that document EPA reiterated its position that there was no direct or indirect relationship between the odor emission regulations and the criteria pollutants for which NAAQS had been established. [p. A-77, *infra*]. EPA further characterized the Final Rule as "corrective action . . . to remedy an oversight in inadvertently approving the odor regulations." [p. A-82, *infra*].

Immediately, upon receipt of notice of the May 2, 1986 signing of the Final Rule, counsel for petitioners advised the District Court as well as respondents' counsel of her intent to file on May 5, 1986 before trial was scheduled to commence a summary judgment motion, premised on the lack of subject matter jurisdiction. Said motion was filed on May 5, 1986. At that time, the trial judge, the Honorable Donald W. VanArtsdalen acknowledged that he did not believe that he could grant relief under the federal Clean Air Act. [Tr. May 5, 1986 at p. 1-22]. Subsequently, respondents' counsel asserted for the first time—in direct contravention of what he had advised the trial court and all other counsel in September 1985 [Tr.

May 5, 1986 at p. 1-19]—that respondents had included in their amended complaint a pendent state law claim. [Tr. May 5, 1986 at pp. 1-13—1-17]. Thus, on May 5, 1986, just prior to commencement of trial, respondents' counsel for the first time advised the trial court and all other parties to the litigation that it had asserted claims under the citizen suit provision of Pennsylvania Air Pollution Control Act, 35 P.S. § 4010(f).

Over the objection of petitioners and the two defendant-intervenors, the District Court proceeded to preside over the merits trial, even though the District Court had acknowledged that no relief could be granted under the Clean Air Act. One can only assume that the court permitted respondents to present their case-in-chief under the mistaken assumption that the amended complaint could be maintained under the Pennsylvania Air Pollution Control Act. As the petitioners had had no prior notice of a pendent state claim either statutory or common law—prior to the commencement of the trial—it was not until the close of respondents' case-in-chief that petitioners' counsel was able to advise the District Court of respondents' failure to comply with the jurisdictional prerequisite for the maintenance of a citizen enforcement action under the state act. The trial court was advised that Section 4010(f) of the Pennsylvania Air Pollution Control Act, 35 P.S. § 4010(f), required respondents to give the Attorney General thirty days' notice prior to the commencement of any action under the state act.

Even after this issue of the failure to meet this jurisdictional prerequisite under the Pennsylvania Air Pollution Control Act had been raised before the District Court and the renewal of the City's May 5, 1986 summary judgment motion, the trial proceedings continued to completion.

In the Order dated July 25, 1986 and entered by the clerk on July 28, 1986, the District Court held that respondents could not maintain this action under the Pennsylvania Air Pollution Control Act as they had failed to satisfy jurisdictional prerequisite of Section 4010(f) of said Act. [p. A-49, *infra*]. However, the trial court, *sua sponte*, asserted its juris-

diction over the underlying litigation on the basis of common law nuisance. [pp. A-50–A-51, *infra*].

The July 25, 1986 Order enjoined the City from operating the Northeast Water Pollution Control Plant ("the Plant") in violation of the Pennsylvania Air Pollution Control Act, 35 P.S. §§ 4001 *et seq.*, and the Philadelphia Air Management Code, 3 Philadelphia Code §§ 101 *et seq.* In addition, the Court ordered the Plant to be operated and maintained so as not to cause any malodor of such intensity, quantity and concentration as unreasonably to cause, injury, harm, annoyance and discomfort to persons of normal sensibilities. [p. A-56, *infra*].

On October 14, 1986, respondents moved to have the petitioners held in contempt of the July 25, 1986 Order. Petitioners denied that they were in contempt of the trial court's order on the grounds that the majority of odors complained of were from barely detectable to light and mild in intensity and were odors incidental to any well-operated and well-maintained plant; and that odors which were strong were attributable to reasons beyond the control of the Petitioners, *e.g.*, the occurrence of a natural phenomenon, Nocardia, which industry experts have not found a means of preventing; the failure of the independent sludge dewatering contractor's equipment; and other equipment failure. Petitioners also maintained that with respect to five alleged odor events, there were no malodors emitted from the Plant.

During the contempt hearing, which commenced December 1, 1986, the City again moved to dismiss the underlying complaint due to lack of subject matter jurisdiction. [Tr. December 1, 1986 at p. 10]. The trial court declared the motion to be a continuing one and denied it. [Tr. Dec. 1, 1986 pp. 10-11].

By order dated January 28, 1987, the District Court held petitioners in contempt of the July 25, 1986 Order. [p. A-21; *infra*]. The January 28, 1986 Order requires the City, *inter alia*, to pay Ten Thousand Dollars ($10,000.00) to the Court upon the occurrence of the issuance of three (3) notices of violation of the Pennsylvania Air Pollution Control Act and/or

the Philadelphia Air Management Code. The money is to be used expressly to compensate parties who have suffered damages attributable to the violation of the state statute or the local ordinance. [p. A-22 *infra*].

The terms of the July 25, 1986 Order were expressly continued in paragraph 4 of the January 28, 1987 Order. [p. A-23, *infra*].

A timely notice of appeal from the January 28, 1987 Order was filed on February 23, 1987. Oral argument was held before the Third Circuit panel on October 20, 1987. The Third Circuit affirmed the District Court's opinion on March 31, 1988. A timely petition for rehearing was denied on April 25, 1988.

REASONS WHY A WRIT SHOULD BE GRANTED

Questions of fundamental importance to the precept that federal courts are courts of limited jurisdiction are presented in this case, including:

1. when is a federal claim so insubstantial or frivolous as to warrant dismissal for want of subject matter jurisdiction;

2. when is a federal claim so insubstantial that there exists no power to exercise pendent jurisdiction;

3. when is a federal court deprived of the power to exercise pendent jurisdiction because Congress in the Clean Air Act has, at least by implication, negated such power (the Second Circuit and the Third Circuit are in apparent conflict on the issue);

4. when, consistent with the Due Process Clause of the Fifth Amendment, can a trial court of its own volition assert a pendent state claim (the Third Circuit and the Fifth Circuit are in conflict on this issue); and

5. when can a court presiding over a state claim ignore the statutory law of that state.

This case also presents for resolution the conflict between the Third Circuit and the Seventh Circuit as to whether individuals can institute suit in federal court, under the citizen enforcement provisions of the Clean Air Act, for alleged violations of provisions that are admitted to be invalid by EPA but which have not yet been repealed. Included in the question is whether the Fifth Amendment permits a municipal government to be prosecuted in federal court for violation of an administrative action that the administrative agency itself acknowledges was beyond its statutory mandate.

In order to resolve these fundamental constitutional and statutory questions, the Writ of Certiorari should be granted.

I. There Exists A Conflict Between The Third And Seventh Circuits As To Whether Private Plaintiffs Under The Clean Air Act Can Sue Under SIP Provisions That Are Nullities

This Court has repeatedly held that, if an Executive

Agency acts inconsistently with the statutory mandate of Congress, that action is a nullity.

> "The power of an administrative officer or board to administer a federal statute and to prescribe rules and regulations to that end is . . .[only] the power to adopt regulations to carry into effect the will of Congress as expressed by the statute. A regulation which does not do this, but operates to create a rule out of harmony with the statute, is a mere nullity." *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134, 56 S. Ct. 397, 400, 80 L.Ed. 528 (1936). *See, e.g., Ernst & Ernst v. Hochfelder*, 425 U.S. 185, 213-214, 96 S. Ct. 1375, 1391, 47 L.Ed2d 668 (1976); *Dixon v. United States*, 381 U.S. 68, 74, 85 S. Ct. 1301, 1305, 14 L.Ed. 2d 223 (1965).

United States v. Larionoff, 431 U.S. 864, 873 n.12 (1977).

A nullity has absolutely no effect at law (*Griggs v. Provident Consumer Discount Co.*, 459 U.S. 56 (1982) and may not be the basis for a federal prosecution. *See e.g., Adamo Wrecking Co. v. United States*, 395 U.S. 185 (1969), and *McKart v. United States*, 395 U.S. 185 (1969). Thus, enforcement in a federal court of an administrative action that represents a nullity violates the Due Process Clause of the Fifth Amendment to the United States Constitution.

EPA, the agency charged by Congress with the implementation of the Clean Air Act, has since at least as early as 1981[1] taken the position that the odor regulations could not be approved for inclusion in the Pennsylvania SIP as such approval exceeded its statutory mandate: In 1981, EPA in re-

1. Moreover, in May 1981, without public comment, EPA refused to approve odor control regulations which had been submitted by Guam for inclusion in its SIP on the ground that "they are not specifically directed at the NAAQS." 46 Fed. Reg. 26,303 (May 12, 1981). Similarly, in August 1981, again without public comment, EPA refused to approve odor control provisions for the Nevada SIP on the ground that "they are not appropriate for incorporation into the SIP." 46 Fed. Reg. 43, 141 (Aug. 27, 1981). Likewise, in May 1982, EPA refused to approve in the Iowa SIP regulations controlling odors "for which EPA has not adopted standards and does not require control." 47 Fed. Reg. 22,531 (May 25, 1982).

viewing Allegheny County's submission for inclusion in the Pennsylvania SIP refused to approve that county's odor regulations as part of the SIP:

> EPA does not have the authority to enforce odor regulations [§ 404 of the County's Regulations]. Therefore, they are not being approved as part of the SIP.

46 *Fed. Reg.* 51610 (October 21, 1981) [Memorandum of Law In Support of Motion to Dismiss pp. 8-9, and Exhibit "B" attached thereto]. Consistent with that position EPA advised the Pennsylvania Department of Environmental Resources ("DER") that any prior approvals of odor regulations for inclusion in the Pennsylvania SIP had been inadvertent and had exceeded the mandate set forth in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a). Thus, they were not enforceable:

> Although EPA initially approved the odor regulations in 1972 as part of the basic SIP, this was an error. EPA does not have the authority to enforce odor regulations and we do not anticipate receiving such authority from Congress in the foreseeable future. Because of this, we have not and will not enforce the existing odor regulations.

Letter, dated April 1, 1983 from EPA to the Pennsylvania Department of Environmental Resources. [Exhibit "A" to Defendants' Reply to Plaintiffs' Memorandum In Opposition to Motion to Dismiss].

In its *amicus curiae* brief before the District Court, EPA once again confirmed that its approval of the odor regulations as part of the Pennsylvania SIP conflicted with its statutory mandate:

> EPA recognizes the problem raised by its approval of the state odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which requires measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to approve a state rule as part of the SIP, the rule must significantly control emissions that

> contribute, directly or indirectly, to concentrations of pollutants for which a NAAQS has been established. Yet the City of Philadelphia points out here, and EPA agrees, that the state odor emission regulations bear no relationship to the attainment or maintenance of any NAAQS.

[p. A-63, *infra*].

In its Final Rule EPA reiterated the requisite statutory nexus for approval of state and local measures as part of a federally enforceable SIP:

> In reviewing SIPs, EPA is governed by the criteria in Section 110(a)(2) of the Clean Air Act, which require measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to properly approve a State rule as part of the SIP, the rule must have a significant relationship to attainment and maintenance of a NAAQ.

[p. A-78, *infra*]. Moreover, EPA also acknowledged in its Final Rule that its action in deleting the odor regulations from the Pennsylvania SIP was merely corrective action since EPA had never found the requisite relationship between odors and any NAAQs:

> EPA is merely taking corrective action here to remedy an oversight in inadvertently approving the odor regulations. The Agency has *never found* any significant relationship between the control of odors and any NAAQS.

[p. A-82, *infra*].

Without addressing the question of whether administrative actions that exceed the statutory mandate, *i.e.*, nullities, could provide the basis for federal subject matter jurisdiction, the Third Circuit held that since the deletion of the odor regulations was procedurally defective, said regulations remained a part of the SIP. And, thus the "Citizens complaint alleged a cognizable federal claim under the Pennsylvania SIP." [p. A-7, *infra*].[2]

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2. The deletion of the odor regulations was held procedurally defective

In marked contrast, is the Seventh Circuit's decision in *Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145 (7th Cir. 1983), where the plaintiffs sought to enforce provisions of the Indiana SIP which had been declared invalid by a state court, but not administratively repealed. The *Sierra Club* court held the invalid portions of the SIP to be unenforceable, stating:

> The proceeding before the Indiana courts was not a revision or modification of a plan. Modification or revision of a [SIP] plan assumes the existence of a valid plan in the first place. The Indiana Court ruled that a valid plan never existed, for there were procedural defects which invalidated the plan at its inception.

Id. at 1151. "'It would be an anomaly, if not a denial of the defendant's due process rights to allow . . . full enforcement of those invalid regulations'" *Sierra Club*, 716 F.2d 1151, quoting *People v. Celotex Corp.*, 516 F. Supp. 716 (C.D. Ill. 1981).

Thus, the decision to grant the requested writ would resolve a conflict among the circuits with respect to whether private citizens may enforce in federal court, SIP provisions that are nullities that have not been administratively appealed.

Moreover, a grant of a writ of certiorari would clarify the respective roles of EPA and private citizens in the enforcement of the Clean Air Act. The decision below produces a quixotic anomaly: private citizens are granted more authority to enforce air pollution control laws under the federal Clean Air Act than the administrative agency charged with that responsibility by Congress may enforce merely because of a mistake of the regulatory agency itself.[3]

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in *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F.2d 777 (3d Cir. 1987), which opinion is reproduced in its entirety in the appendix hereto at p. A-96, *infra*. The Third Circuit had reached this conclusion by characterizing the deletion as a revision to the SIP, necessitating a public hearing, rather than a correction of a mistake that was within EPA's inherent power. *See, e.g., American Trucking Assoc. v. Frisco*, 358 U.S. 133 (1953); and *Dixon v. United States*, 381 U.S. 68 (1965).

3. It is a well-established principle of statutory construction that a statute should not be construed in a manner which leads to absurd results. *United States v. Turkette*, 452 U.S. 576 (1981).

II. The Decision Below Violates The Basic Principle That Federal Courts Are Courts Of Limited Jurisdiction[4]

"It is a fundamental precept that federal courts are courts of limited jurisdiction. The limits upon federal jurisdiction, whether imposed by the Constitution or Congress, must be neither disregarded nor evaded." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 374-375 (1978).

An inadvertent administrative act, which has been, since at least as early as 1981, acknowledged to be in conflict with the statutory mandate, cannot enlarge the District Court's subject matter jurisdiction. An agency of the Executive Branch cannot use its delegated authority to confer or alter the jurisdiction of the federal courts:

> A grant of rulemaking power is not authority to create federal jurisdiction. That authority lies solely with Congress.

Marshall v. Gibson's Products, Inc., 584 F.2d 668, 677 (5th Cir. 1978) (footnote omitted); accord, *Columbia Manufacturing Corp. V. National Labor Relations Board,* 715 F.2d 1409, (9th

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4. The Third Circuit has characterized petitioners' appeal of the question of subject matter jurisdiction as a collateral attack. [p. A-7 *infra*]. However, as this Court has construed contempt proceedings not to be an independent cause of action but part of the underlying action, *Leman v. Krenter-Arnold Hinge Last Co.*, 284 U.S. 448 (1931), any defense thereto or motions made therein are direct attacks. Secondly, for at least one hundred years, this Court has held that federal courts lacking jurisdiction to issue the underlying order also lack the ability to enforce that order by means of the contempt powers. *Ex parte Ayers,* 123 U.S. 445 (1887); *In re Sawyer* 124 U.S. 200 (1888); and *United States v. United Mine Workers of America,* 330 U.S. 258 (1947). Thirdly, at the commencement of the contempt hearing, petitioners made a F.R.Civ.P.60(b)(4) motion to dismiss the underlying complaint. An F.R.Civ.P.60(b)(4) motion represents a direct attack on a void judgment, *Watts v. Pickney,* 735 F.2d 406 (9th Cir. 1985). Fourthly, the January 28, 1987 Order, from which an appeal was taken, expressly continues provisions of the prior injunction issued on July 26, 1986. [p. A-23, *infra*]. The attack on the district court's subject matter jurisdiction was direct. Regardless, it is well-settled that subject matter jurisdiction is never waived. *See, e.g., Mansfield, Coldwater & Lake Michigan Ry. v. Swan,* 111 U.S. 379 (1884).

Cir. 1983) ("The authority to make rules of procedure relating to the exercise of jurisdiction is not an authority to enlarge that jurisdiction).

A. Congress by Implication Has Negated Pendent Jurisdiction For Odor Regulations

Moreover, this fundamental precept of limited jurisdiction further circumscribes a District Court's power to exercise its pendent jurisdiction, particularly in circumstances where Congress has expressly or by implication negated such exercise. *Aldinger v. Howard*, 427 U.S. 1 (1976).

In *Aldinger*, Chief Justice Rehnquist, writing for the Court, declared that the power to exercise pendent jurisdiction turns initially upon construction of the jurisdictional statute in question:

> But the question whether jurisdiction over the instant lawsuit extends not only to a related state-law claim, but to the defendant against whom that claim is made, turns initially, not on the general contours of the language in Art III, *i.e.*, "Cases . . . arising under," but upon the deductions which may be drawn from congressional statutes as to whether Congress wanted to grant this sort of jurisdiction to federal courts.

Id. at 427 U.S. 16-17. "Before it can be concluded that . . . [pendent] jurisdiction exists, a federal court must satisfy itself not only that Art. III, permits it, but that Congress in the statutes conferring jurisdiction has not expressly or by implication negated its existence." *Id.* at 427 U.S. 18.

Congress in Section 110(a) of the Clean Air Act, 42 U.S.C. § 7410(a), has expressly limited enforcement of state and local air pollution control measures under the federal Clean Air Act to those measures which significantly affect the attainment and maintenance of national ambient air quality standards. In so doing, Congress has negated, at least by implication, the federal court's authority to exercise pendent jurisdiction over those state and local air pollution control measures which lack this nexus to the national ambient air quality standards. Thus, by implication, Congress has ne-

gated the District Court's exercise of pendent jurisdiction over the odor regulations included in the Pennsylvania SIP.

Utilizing this precept of limited federal jurisdiction, the United States Court of Appeals for the Second Circuit in *United States v. North Hempstead*, 610 F.2d 1025 (2d Cir. 1979), *sua sponte*, examined the power of a trial court, which did possess federal subject matter jurisdiction over a claim under the Clean Air Act premised on other grounds, to exercise pendent jurisdiction over a state claim based on odors emitting from a municipal landfill. The Court concluded that subject-matter jurisdiction was lacking:

> No amount of talk can confer subject matter jurisdiction upon a federal court. Nor can subject matter jurisdiction arise from the circumstance that the exercise of such judicial power is desirable or expedient. And this is especially true where the case involves, as here, federal and state courts and administrative agencies with separate and clearly defined powers. The reason for this is that the case must relate to a "case or controversy" as provided in the Judicial Article of the Constitution and, as the District Courts are "inferior" courts, the "case or controversy" must be one over which the particular court is given *by Act of Congress* over the subject matter.

Id., 610 F.2d at 1025. In enacting the Clean Air Act, Congress conferred upon district courts the limited jurisdiction to enforce state and local air pollution measures that maintain or attain NAAQS but *not* the jurisdiction to enforce all other state and local odor regulations. Indeed, said pendent jurisdiction has been impliedly negated.

This apparent conflict between the Second and Third Circuits concerning whether the Clean Air Act vests district courts with the power to exercise pendent jurisdiction over claims arising under state odor regulations should be resolved by the issuance of a Writ of Certiorari.

B. As There Was No Substantial Federal Claim, The District Court Was Without Power Or Discretion To Exercise Pendent Jurisdiction

Likewise, the District Court was without power to exer-

cise pendent jurisdiction because there existed no substantial federal claim to which a state claim could be appended:

> Pendent jurisdiction, in the sense of judicial *power*, exists whenever there is a claim "arising under [the] Constitution, the Laws of the United States, and Treaties made, or which shall be made, under their Authority . . ." U.S. Const., Art. III § 2 and the relationship between that claim and the state claim permits the conclusion that the entire action before the court comprises but one constitutional "case." The federal claim must have substance sufficient to confer subject matter jurisdiction on the court. *Levering & Garrigues Co. v. Morrin*, 289 U.S. 103, 53 S.Ct. 549, 77 L.Ed. 1062. The state and federal claims must derive from a common nucleus of operative fact. But if, considered without regard to their federal or state character, a plaintiff's claims are such that he would ordinarily be expected to try them all in one judicial proceeding, then, assuming substantiality of the federal issues, there is *power* in federal courts to hear the whole.

United Mine Workers of America v. Gibbs, 383 U.S. 715, 725 (1966) (emphasis in the original). Whether a claim is sufficiently substantial to confer the District Court with the power to exercise pendent jurisdiction depends on whether the court finds it to be so insubstantial or frivolous as to warrant dismissal for want of subject matter jurisdiction under F.R.Civ. 12(b)(1) (See, e.g., *Bell v. Hood*, 327 U.S. 678, 683 (1946)) or as to warrant dismissal under F.R.Civ.P. 12(b)(6) or disposal under F.R.Civ.P. 56. *See, e.g., Lechtner v. Brownyard*, 679 F.2d 322, 327-328 (3d Cir. 1982).

As stated above, the inclusion of odor regulations in the Pennsylvania SIP were beyond EPA's delegated authority and, as such, constituted a nullity. A nullity cannot serve as a basis for either a substantial federal claim or federal subject matter jurisdiction. Thus, as a matter of law, the trial court was without judicial power to exercise pendent jurisdiction.

Moreover, the guidelines set forth by this Court in *United Mine Workers v. Gibbs*, supra also demonstrate that even

if the District Court had the power to exercise pendent jurisdiction, it was an abuse of discretion to do so. Speaking for a unanimous Court, Justice Brennan announced that "if the federal claims are dismissed before trial, even though not insubstantial in a jurisdictional sense, the state claims should be dismissed as well." *Id.* at 383 U.S. 726. In the case now under consideration, the District Court, prior to the commencement of trial, acknowledged belief that relief could not be afforded under the federal Clean Air Act. [Tr. May 1, 1986 at p. 1-22]. The trial commenced, presumably, under respondents' eleventh-hour assertion of a claim under the Pennsylvania Air Pollution Control Act.

Even if the state statutory claim had been viable, the directives set forth in *United Mine Workers v. Gibbs, supra,* would still mitigate against the exercise of pendent jurisdiction as state issues substantially predominated over federal issues:

> Similarly, if it appears that the state issues substantially predominate, whether in terms of proof, of the scope of the issues raised, or of the comprehensiveness of the remedy sought, the state claims may be dismissed without prejudice and left for resolution to state tribunals.

Id. at 383 U.S. 726-727.

III. The Trial Court's Sua Sponte Assertion Of Pendent Jurisdiction Two And One-Half Months After The Merits Trial Violates Not Only The Doctrines Of Judicial Self-Restraint And Pendent Jurisdiction But Also The Due Process Clause

Pendent jurisdiction, unlike subject matter jurisdiction cannot be raised at any stage of the litigation. *Mayor of Philadelphia v. Educational Equality League,* 415 U.S. 605, 627 (1974). Indeed, "in determining whether jurisdiction over a nonfederal claim exists, the context in which the nonfederal claim is asserted is crucial." *Owen Equipment & Erection Co. v. Kroger,* 437 U.S. 365, 375-376 (1978).

In the matter *sub judice,* the District Court in its July 26,

1986 decision on the merits, rendered more than two and one-half months after the trial, of its own volition, rewrote respondents' one-count complaint to include a common law nuisance count. The judicial redrafting occurred despite the District Court's characterization of this lawsuit just two weeks prior to the commencement of trial:

> Plaintiffs brought this suit on January 3, 1985, under 42 U.S.C. Section 7604 to enforce the provisions of the Clean Air Act, 42 U.S.C. Sections 7401-7626, against the defendants for their operation of the Northeast Water Pollution Control Plant (N/E WPCP), a sewage treatment plant. The plaintiffs alleged in their amended complaint [of April 11, 1985] that the defendants' operation of the N/E WPCP released noxious odors in the surrounding community in violation of nine sections of the Pennsylvania Air Management Code and its accompanying regulations which constitute part of Pennsylvania's State Implementation Plan (SIP) of the Clean Air Act that was approved by the Administrator of the United States Environmental Protection Agency and promulgated under 40 CFR 50.2020 *et seq.*, as required by 42 U.S.C. Section 7401.

[April 22, 1986 Opinion of the District Court at p. 1], and despite the District Court's acknowledgment at the commencement of the trial that "[i]t's true that in the so-called jurisdictional allegation [of the complaint] there is no claim for pendent State causes of action" [Tr. May 5, 1986 at p. 1-22]. Thus, this post-trial redrafting of the complaint by the District Court afforded petitioners no opportunity to defend themselves under this state law claim.

The Fifth Circuit, in contrast to the Third Circuit, has admonished such judicial conduct:

> The concept that a federal trial court may of its own volition, after trial, consider state law claims not pleaded by the plaintiffs does not appear constant with either doctrine [i.e., the exercise of pendent jurisdiction and the

> exercise of judicial self-restraint]. Not only does the court thus reshape the plaintiffs' suit, but it does so after trial when there is no opportunity to fashion proof or presentation directly to the state law issues.

Ruiz v. Estelle, 679 F.2d 1115, 1158 (5th Cir. 1982) *opinion amended in part*, 688 F.2d 266 (5th Cir. 1982), *cert. denied*, 460 U.S. 1042 (1983). As counsel for respondents admitted at oral argument before the Third Circuit, petitioners did not have notice of any state law claims. This represents a violation of the petitioners' fundamental right to "notice" and "fairness" that is guaranteed by the Due Process Clause of the Fifth Amendment.

IV. The Imposition Of Fines To Compensate Respondents For Violations Of State And Local Regulations Contravenes State Law And Flagrantly Ignores The Erie Doctrine

Eric v. Tompkins, 304 U.S. 64 (1938) and its progeny have established that the source of the right sought to be vindicated—not the basis of subject matter jurisdiction—determines whether the state or federal law applies. *See e.g., Van Gemert v. Boeing Co.*, 553 F.2d 812 (2d Cir. 1977).

In the matter now before the Court, compensatory damages have been assessed against the petitioners without regard for the governmental immunity conferred upon them by the General Assembly of the Commonwealth of Pennsylvania in the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. § 8541, *et seq.* The January 28, 1987 Order requires "the City of Philadelphia shall pay a coercive penalty of $10,000.00 *to be held for the benefit of persons injured or harmed by any violation of the injunction*, the distribution of such sums to be subject to further order of this court, to be determined by such further proceedings as may be required." [p. A21-22, *infra*]. Moreover, in its memorandum opinion which accompanied the said order, the District Court stated that these penalties would "be placed in a special fund to

compensate the named plaintiffs for the injury caused."[5] [p. A-19, *infra*]. However, the Pennsylvania General Assembly has granted political subdivisions of the Commonwealth, such as the City of Philadelphia, immunity from the assessment of such compensatory damages. In 1976, the Pennsylvania Political Subdivision Tort Claims Act, 42 Pa. C.S. §§ 8541 *et seq.* ("Tort Claims Act")[6] was enacted by the General Assembly as a direct response to the judicial abrogation of the doctrine of governmental immunity in *Ayala v. Philadelphia Board of Public Education*, 453 Pa. 584, 305 A.2d 877 (1973). *Carroll v. York*, 496 Pa. 363, 437 A.2d 394 (1981). "Pennsylvania, by passage of the Tort Claims Act, has generally retained sovereign immunity for its political subdivisions. This municipal immunity is waived for only eight types of negligence conduct." *Buskirk v. Seiple*, 560 F.Supp. 247, 252 (E.D. 1983). Specifically, Section 8541 of the Tort Claims Act provides:

> Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by an act of the local agency or an employee thereof or any other person.

Those eight areas of government conduct which are excepted from the general grant of immunity are: (1) vehicle liability, (2) care, custody or control of personal property, (3) real property, (4) trees, traffic controls and street lighting, (5) utility service facilities, (6) streets, (7) sidewalks, and (8) care, custody or control of animals. *Id.* § 8542(b). "Claims which are not governed in one of these specific areas of liability are barred by the retention of governmental immu-

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5. In disregard of Due Process considerations of the Fifth Amendment to the United States Constitution, the compensatory penalties assessed against the City of Philadelphia were made without any showing of actual harm: Indeed, the District Court found that "there has been no showing, by way of affidavits or other competent evidence, of any actual monetary loss or damages suffered by the plaintiffs due to the continuing violations." [p. A-20, *infra*].

6. A copy of the Tort Claims Act in its entirety is included in the appendix hereto at pp. A-88, infra.

nity." *Lopuszanski v. Fabey*, 560 F. Supp. 3, 5-6 (E.D. Pa. 1982).

The conduct complained of by respondents does not fall within the scope of the Tort Claims Act for three reasons: First, respondents could not recover damages under either the Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, or the Philadelphia Air Management Code. Second, the Commonwealth of Pennsylvania has limited petitioners liability for damages to those injuries caused by negligent acts. Third, the governmental conduct complained of does not fall into one of the eight narrow exceptions to immunity. Thus, under Pennsylvania Law, respondents cannot be compensated for any injuries they may have sustained because of violations of state and local odor regulations.

Under *Erie* and its progeny, the District Court must abide by Pennsylvania Tort Claims Act where the rights sought to be vindicated arise under state law.

CONCLUSION

For the reasons set forth above, Petitioners respectfully pray for a Writ of Certiorari to issue to the United States Court of Appeals for the Third Circuit to review the opinion and decision of that court.

Respectfully submitted,

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Counsel for Petitioners.

88-143

No. -

In the Supreme Court of the United States

OCTOBER TERM, 1987

THE CITY OF PHILADELPHIA, and
JAMES STANLEY WHITE, in his capacity as
MANAGING DIRECTOR, and
WILLIAM J. MARRAZZO, in his capacity as
WATER COMMISSIONER,

Petitioners,

v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

APPENDIX TO PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

SEYMOUR KURLAND, CITY SOLICITOR
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UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1092

CONCERNED CITIZENS OF BRIDESBURG; COPPOLA, JAMES; KUMOSINSKI, ROBERT; PTAK, MIA; COPPOLA, KATHLEEN; HAGENDEY, HARRY; HAGENDEY, KATHLEEN; RICKEY, ELIZABETH; PFEIFFER, FRANCES; PFEIFFER, JOSEPH; LUDIGAN, EDWARD; LES, ANTHONY; MITCHELL, ETHEL R.; FINNEGAN, CHARLES A.; BUTLER, MICHAEL; LEWANDOWSKI, AL; LEWANDOWSKI, LINDA; DYLINSKI, KAREN; COMBS, CHARLES, H.; MARINUK, ETHEL; ARENWEH, KAREN; PAWLOWSKA, CECILIA; SHORT, DOLORES; DOMBROWSKI, VINCENT; PORTONI, BARBARA LYNN; ELTON, MARY; GROFF, RUTH C.; BURNS, ANNA-MAY; DONACHIE, EDNA; KINGSTON, EDNA; FOSTER, DENNIS J.; CHARLTON, KELLY; HAUG, MARK D.; PIERGROSSI, TILLIE; LARSEN, JOE; LARSEN, SUE; JOHN WATERS AUTO SALES; SILEO, RICH; ANTONELLI, AGNES; MANTICI, ALBERT; PORTONE, ROBERT J.; SCHMIDT, THELMA; LONG, BETTY; FRONCEH, MARK; FRANCEK, TONI; CONCEPTAL, BILL; CONCEPTAL, DEL; WOLK, LINDA; FERN, CLAIR; McGOVERN, PEARL; KOZLOWSKI, LOUIS; PUSICZ, GELWIN; RISPO, JOYCE; SOUTHERLAND, STACEY; AUERWECK, TINIA; AUERWECK, ELIZABETH; MARINUK, ERNEST; YODIN, T.; MOSCICKI, CYNTHIA; RESPO, JAMES O.; GORSKI, MARIE; JAMES, FLORENCE; JAMES, JOE; ROMER, ANGEL; NOVAK, STEPHANIE; NOVAK, NELLIE; O'DONNEL, SUE; O'DONNELL, BILL; PIHALA, EDWARD, SR.; McLAVERTY, JOHN; HILL, BENNETT; CALO, ANTHONY; WILLIAM, C.;

FLANAGEN, ROBERT; REKALA, BOBBY; KUMOSINSKI, MAUREEN; PAWLOSKI, ANNA M.; PAWLOSKI, STANLEY M.; LISICKI, MICHAEL M.; LISICKI, LINDA A.; KUMOSINSKI, EMILY; McMASTER, NANCY; ELTON, MARY; KUMOSINSKI, FRANK; PALKA, ANDY; HOWARD, AMEY E.; COPPOLA, KATHERINE; GORDON, JOSEPHINE; KONOPKA, ANNA; KURPASKA, ARLENE; PRENDERGAST, JOHN; PRENDERGAST, BETTY; LERMAN, PHIL; LERMAN, ESTHER; FLYNN, LINDA; WAGNER, VIRGINIA; JAMES, PAULINE; HAYES, JUSTINE; BINGEL, PETER; BINGEL, JOAN; PARCALE, MICHAEL; PALKA, ANDY; MASON, HELEN; PEOCCAINERI, FLORENCE; MALLOY, WILLIAM; HOOD, WILLIAM R.; RORENBERGER, HERB; MORONESE, WILLIAM; RENFE, JACK; SMITH, PERRY M.; SVITAK, JOHN; ATKINSON, JOHN; STARK, MICHAEL H.; PRINCE, WENDY; BERGER, DOLORES; BERGER, STANLEY; HIGHAM, BETTY; COLLINS, MARY LUCY; KIRBY RONNIE; GOGOJ, MARY; MELLEY, WILLIAM; CASEY, ELLEN; GIBSON, SHARON; CUICH, LISE; FRONCEK, LINDA; PALKA, RITA; PARTTEZZIA, JACQUELINE; KOZLOWSKI, WALTER; SERPICO, CHRISTINA; McKINLEY, ELEANOR; BYRME, STEPHIE; TURNER, SHEN; and YODER, MARY

v.

PHILADELPHIA WATER DEPARTMENT; THE CITY OF PHILADELPHIA; MARRAZZO, WILLIAM J., in his capacity as Water Commissioner of Philadelphia; WHITE, JAMES STANLEY, in his capacity as Managing Director of the City of Philadelphia; ROHM & HAAS COMPANY; and ALLIED CORPORATION

CITY OF PHILADELPHIA,
WILLIAM J. MARRAZZO and
JAMES STANLEY WHITE,

Appellants

On Appeal from the United States District Court
for the Eastern District of Pennsylvania
(D.C. Civil Action No. 85-0014)

Argued October 20, 1987

Before: HIGGINBOTHAM, SCIRICA and
GARTH, *Circuit Judges.*

Assigned December 21, 1987

(Filed March 31, 1988)

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OPINION OF THE COURT

A. LEON HIGGINBOTHAM, JR., *Circuit Judge*.

This appeal rises from an action brought by the residential neighbors of an urban sewage treatment facility. The appeal concerns a contempt citation issued against appellants (together, "the City" or "Philadelphia") for violating an injunction previously entered by the district court. We hold that the district court at all times had federal subject matter jurisdiction over this action and that it did not err when it held Philadelphia in civil contempt. Accordingly, we will affirm the judgment of the district court in all respects.

I. *BACKGROUND*

Appellees, a community organization named the Concerned Citizens of Bridesburg and the individual residents who constitute it (collectively, "the Citizens") brought this action in 1985 under the citizen lawsuit provision of the federal Clean Air Act, 42 U.S.C. § 7604 (1982). The Citizens live in the Bridesburg section of Philadelphia. Their neighborhood surrounds the Northeast Water Pollution Control Plant ("the Northeast Plant"), a sewage treatment and disposal facility that serves the northeastern areas of Philadelphia. The Citizens' action alleged that Philadelphia was operating the Northeast Plant in violation of state and municipal odor regulations that are incorporated in the Pennsylvania State Implementation Plan ("the Pennsylvania SIP"), 40 C.F.R. § 52.2020 (1987). The Pennsylvania SIP is a federal regulation promulgated pursuant to the Clean Air Act, 42 U.S.C. § 7610 (1982). The action went to trial in May, 1986. Two months later, the district court, in an order that was accompanied by a comprehensive opinion, enjoined Philadelphia from, *inter alia*, operating the Northeast Plant in violation of the applicable odor emission regulations. *Concerned Citizens of Bridesburg v. City of Philadelphia*, 643 F. Supp.

713, 730-31 (E. D. Pa. 1986). Philadelphia took no appeal from this injunctive order.

On October 14, 1986, the Citizens moved that Philadelphia be found in civil contempt for violating the district court's injunction. At the hearing on this motion, the Citizens presented evidence demonstrating that, since August 1, 1986, air pollution inspectors working for the City of Philadelphia's Air Management Services had issued twenty-eight notices of violation against the Northeast Plant. During the time period from August 1 through October 14, the Northeast Plant had also been notified of additional resident complaints, filed pursuant to the injunction, for which Air Management Services did not issue odor violation notices.

On January 28, 1987, the district court found that Philadelphia had "repeatedly" violated the injunction and declared the City to be in civil contempt. *Concerned Citizens of Bridesburg*, Civil No. 85-14, mem. op & order (E.D. Pa. Jan. 28, 1987), *reprinted in* Appendix ("App.") at 1967-82. To coerce Philadelphia to comply with the injunction, the district court at this time imposed a civil contempt sanction. It required Philadelphia (1) to employ an independent engineer to undertake a comprehensive study of the Northeast Plant and to make recommendations for the prevention of malodorous emissions therefrom, and (2) to pay $10,000 into the district court registry whenever the City violated the terms of the injunction three or more times within any thirty-day period. The district court also stated that if compensatory damages were subsequently awarded to persons injured by Philadelphia's contumacious actions, such damage awards would be defrayed by any coercive penalties that Philadelphia had paid into the district court's registry. Philadelphia took this appeal from the contempt judgment.

II. *SUBJECT MATTER JURISDICTION*

The first issue that we must address concerns the jurisdictional basis of the district court's adjudication of the underlying dispute. Since this is a question of law, our standard of review is plenary.

From the time the Citizens first filed their complaint, Philadelphia has contested the district court's subject matter jurisdiction over the action. The district court first dealt with this issue when it denied Philadelphia's pretrial motion to dismiss on the grounds that the odor regulations in the Pennsylvania SIP were invalid and unenforceable. *Concerned Citizens of Bridesburg v. Philadelphia Water Dep't.* Civil No. 85-14, mem. op. & order (E.D. Pa. Apr. 23, 1985), *reprinted in* App. at 122-43. Philadelphia renewed this motion at the start of trial. Joint Motion Of Defendants And Defendant-Intervenors For Summary Judgment Or In The Alternative For Dismissal, *reprinted in* App. at 389-91. The district court denied it from the bench.

After the trial was completed, the United States Environmental Protection Agency ("EPA") on May 20, 1986, published a regulation deleting the odor regulations from the Pennsylvania SIP. 51 Fed. Reg. 18,438-40 (1986), *reprinted in* App. at 1345-47. This regulation took effect on June 19, 1986. Notwithstanding this amendment to the regulatory scheme, the district court, in its judgment of July 28, 1986 held that it had subject matter jurisdiction over the Citizens' federal claims because they were valid at least until after the trial was completed. *Concerned Citizens of Bridesburg*, No. 85-14, op. & order at 33-34 (E.D. Pa. July 28, 1986), *reprinted in* App. at 1397-98. In addition, the district court found that the Citizens' complaint implicitly made out a claim of common law nuisance sufficient to give the district court subject matter jurisdiction. *Id.* at 37, *reprinted in* App. at 1401. These holdings were aspects of the judgment that Philadelphia did not appeal. Nonetheless, it now attempts, on this appeal from the contempt judgment of January 28, 1987, to attack collaterally the district court's legal conclusions regarding subject matter jurisdiction.

Philadelphia's claim that the district court lacked subject matter jurisdiction to enter the underlying injunction is now moot. On December 18, 1987, after we heard argument on this appeal, another panel of this Court held that the EPA's attempt to modify the Pennsylvania SIP by directly deleting

the odor regulations was procedurally invalid under the applicable section of the Clean Air Act. *Concerned Citizens of Bridesburg v. United States EPA*, 836 F. 2d 777 (3d Cir. 1987). The decision means that the EPA's attempt to delete the odor regulations from the Pennsylvania SIP is, and has always been, a legal nullity. *See, e.g., United States v. Larionoff*, 431 U.S. 864, 873 n. 12 (1977); *Manhattan General Equip. Co. v. Commissioner*, 297 U.S. 129, 134 (1936) ("A regulation which . . . operates to create a rule out of harmony with the statute is a mere nullity."). Accordingly, the district court's original pretrial determination that the Citizens' complaint alleged a cognizable federal claim under the Pennsylvania SIP, *Concerned Citizens of Bridesburg*, Civil No. 85-14, mem. op. and order at 13 (E.D. Pa. Apr. 23, 1985) ("it is clear beyond doubt that both the state and city odor regulations are currently part of the Pennsylvania SIP that has been approved by the EPA"), *reprinted in* App. at 135, is legally correct in this Circuit.

In light of the legal developments since this appeal was briefed and argued, we will not determine whether Philadelphia could collaterally attack the district court's subject matter jurisdiction in this appeal from a contempt judgment. We also will express no opinion regarding the hypothetical question whether the district court would have had subject matter jurisdiction over the Citizens' action if EPA had properly rescinded the odor regulations contained in the Pennsylvania SIP after trial but before the district court entered its final judgment in the underlying action.

III. *THE CONTEMPT JUDGMENT*

Philadelphia claims that, because it did not violate the injunction, the contempt judgment was entered in error. We disagree. The record amply demonstrates that the Citizens satisfied their burden of showing the City's civil contempt by "clear and convincing evidence," *Fox v. Capital Co.*, 96 F. 2d 684, 686 (3d Cir. 1938), for "there is (no) ground to doubt the wrongfulness of the (City's) conduct" between the time of the injunctive order and the date the contempt judgment was entered. *Id.*; *cf. Quinter v. Volkswagen of Am.*, 676 F. 2d 969,

974 (3d Cir. 1982) ("Although it came within a scintilla of doing so, (plaintiff) Volkswagen has not satisfied the clear and convincing evidence standard set forth by this circuit in *Fox*. . . .").

The City's second claim is that, since the record contained no evidence of the Citizens' actual losses, the district court erroneously imposed a coercive penalty for civil contempt. This claim rests upon a misreading of *McDonald's Corp. v. Victory Investments*, 727 F.2d 82 (3d Cir. 1984). In that decision, we explained that "civil contempt may be employed to coerce the defendant into compliance with the court's order and to compensate for losses sustained by the disobedience. . . . In the *latter* instance, a fine may be imposed payable to the complainant, but it must be based upon evidence of complainant's actual loss." Id. at 87 (emphasis added); *accord Latrobe Steel Co. v. United Steelworkers of Am., AFL-CIO*, 545 F.2d 1336, 1344 (3d Cir. 1976). The City's argument gets the distinction between coercive and compensatory contempt judgments exactly backward. *See* Brief of Appellants at 42-43. Since the district court explicitly imposed a *coercive* sanction against Philadelphia, *Concerned Citizens of Bridesburg*, No. 85-14, mem. op. at 12 (E.D. Pa. Jan. 28, 1987), *reprinted in* App. at 1978, no evidence of actual loss by the Citizens was required.

The City's final claim argues, *inter alia*, that the possibility that compensatory damages will be paid out of coercive fines imposed pursuant to this contempt judgment runs afoul of the sections of Pennsylvania's Political Subdivision Tort Claims Act that apply to actions against local parties, 42 Pa. Cons. Stat. Ann. §§ 8541-64 (Purdon 1982). Since the Citizens' underlying action is based upon the federal Clean Air Act and the contempt order upon Fed. R. Civ. P. 70, however, the Supremacy Clause defeats the City's argument. *See* U.S. Const. art. VI, § 2.

IV. *CONCLUSION*

For the foregoing reasons, we will affirm the judgment of the district court.

Garth, J., *concurring.*

I am in full accord with the majority opinion, with the exception of the manner in which it has chosen to reject the City of Philadelphia's claim that the City need not comply with the district court's contempt order because that order runs afoul of the Pennsylvania Tort Claims Act, 42 Pa. Cons. Stat. Ann. §§ 8541-64 (Purdon 1982). The City's argument is predicated on its anticipation that some of the monies it is required to pay as a result of the district court's contempt order may ultimately be utilized to compensate property owners.

The majority has resolved this issue by invoking the Supremacy Clause of the United States Constitution. I have difficulty understanding the relevance of such a disposition in the context of this case. Moreover, in my opinion, it is inappropriate to resort to a constitutional analysis here in order to resolve the City's contentions. While the City may very well be immunized by the Pennsylvania Tort Claims Act where a tort has been committed by the City, the Act does not purport to, nor can it, immunize the City from paying fines imposed by the district court for the City's failure to comply with the court's order. In short, the Pennsylvania Tort Claims Act simply does not apply to a court's valid imposition of a coercive penalty.

As a consequence, the City's invocation of Pennsylvania's Tort Claims Act is without merit, and must be resolved against the City. However, I do not believe the majority is correct in deciding this matter on a constitutional ground where a more narrow resolution of this issue may be based on the inapplicability of the Pennsylvania statute. *See Hagans v. Lavine*, 415 U.S. 528, 543 (1974).

In all other respects, I concur in the majority's opinion.

A True Copy:

Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1092

CONCERNED CITIZENS OF BRIDESBURG, et al.

v.

PHILADELPHIA WATER DEPARTMENT, et al.,
Appellants

(D.C. Civil No. 85-0014)

SUR PETITION FOR REHEARING

Present: GIBBONS, *Chief Judge*, SEITZ, HIGGINBOTHAM, SLOVITER, BECKER, STAPLETON, MANSMANN, GREENBERG, SCIRICA and COWEN,
Circuit Judges.

The petition for rehearing filed by appellant in the above-entitled case having been submitted to the judges who participated in the decision of this Court and to all the other available circuit judges of the circuit in regular active service, and no judge who concurred in the decision having asked for rehearing, and a majority of the circuit judges of the circuit in regular service not having voted for rehearing, the petition for rehearing by the panel and the Court in banc, is denied.

BY THE COURT:

/s/
Circuit Judge A. Leon Higginbotham

Dated: April 25, 1988

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 87-1092

CONCERNED CITIZENS OF BRIDESBURG, et al.

v.

PHILADELPHIA WATER DEPARTMENT, et al.,
CITY OF PHILADELPHIA, et al., *Appellants*

Pursuant to Rule 41(b) of the Federal Rules of Appellate Procedure, it is ORDERED that issuance of the certified judgment in lieu of formal mandate in the above cause be, and it is hereby stayed until July 24, 1988.

/s/
Circuit Judge A. Leon Higginbotham

Dated: April 26, 1988

IN THE UNITED STATES DISTRICT COURT FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCERNED CITIZENS OF BRIDESBURG, et al.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al.	:	NO. 85-14

MEMORANDUM OPINION AND ORDER

VanARTSDALEN, S.J. January 28, 1987

By order dated July 25, 1986, following a full trial on the merits, the City of Philadelphia was enjoined from maintaining and operating the Northeast Water Pollution Control Plant (NeWPCP) in violation of the emission provisions of the Pennsylvania Air Pollution Control Act, 35 Pa. Stat. Ann. § 4001 *et seq.*, the Philadelphia Air Management Code §§ 3-102(3), (5), (25), and 3-201(a)(3), and the respective regulations promulgated pursuant to the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code. (Court Order, July 25, 1986, ¶ 1). The City was further enjoined from maintaining and operating the NeWPCP "in such a way or manner as to cause the emission into the ambient air of any malodor of such intensity, quantity and concentration as unreasonably to cause injury, harm, annoyance, or discomfort to persons of normal sensibilities who are not on the land of the Northeast Water Pollution Control Plant." (Court Order ¶ 2). The order directed that whenever the NeWPCP was notified by Air Management Services of the City of Philadelphia of a violation of the odor regulations of either the Philadelphia Air Management Code or the Pennsylvania Air Pollution Control Act, the City's Water Department was required to conduct a comprehensive investigation of the source and cause of the violation and take all reasonable measures to eliminate the violation and any potential for repetition. (Court Order ¶ 3). The NeWPCP and the Philadel-

phia Water Department were then required to jointly file with the court, within seventy-two hours of receiving notice of a violation from Air Management Services, a detailed written report showing full compliance with the order's directive to conduct an investigation and attempt to eliminate the cited odor emission violation. (Court Order ¶ 3). The NeWPCP and the Water Department were also ordered to file a report with this court whenever a written complaint of an odor emission violation by the NeWPCP was made and signed by three residents of the community to Air Management Services, irrespective of whether, upon investigation, Air Management Services failed to find and notify the NeWPCP of a violation. (Court Order ¶ 4).

The order provided that any party having a proper interest in the case could seek a citation for contempt "in the event of any violation of any portion of this order" and that a prompt hearing for contempt would be held, upon request, in the event that three or more reports as mandated by paragraph 3 and/or 4 of the order were required to be filed with this court within any thirty-day period. (Court Order ¶ 5).

On October 14, 1986, the plaintiffs filed a motion to hold the City in civil contempt of the July 25, 1986 Order, due to alleged continuing frequent episodes of the NeWPCP emitting foul odors into the community. A hearing was held on plaintiffs' motion, commencing on December 1, 1986.

The evidence presented at the hearing and subsequently conceded to in defendants' proposed findings of fact and conclusions of law show that between August 1, 1986 and the date of the hearing, Air Management Services issued twenty-eight notices of violation of the Air Management Code, based upon inspections conducted by air pollution inspectors. The NeWPCP was also notified of an additional number of "resident complaints" filed pursuant to paragraph 4 of the July 25, 1986 Order, for which no odor violation notices were issued by Air Management Services. The plaintiffs argue that the large number of cited odor violations and complaints of malodor emissions from the NeWPCP constitute a violation of the

injunction imposed by this court's July 25, 1986 Order, thereby requiring a finding of civil contempt.

The City argues it is not in civil contempt of the order because (1) the plant is well-maintained and well-operated; (2) the plant has incorporated into its system "state-of-the-art" air pollution control mechanisms and equipment to reduce the potential for odors; and (3) the nature, intensity and causes of the odors do not justify a finding of contempt. In substance, defendant has contended throughout this litigation that it is doing the best it can and that it has not and is not willfully violating its own air pollution control regulations. Additionally, the City argues that the twenty-eight notices of violation issued by Air Management Services do not equate to twenty-eight violations of the July 25, 1986 injunction.

Air Management Services is a division of the Philadelphia Department of Public Health which is charged with the duty of enforcing the Philadelphia Air Management Code and the Pennsylvania Air Pollution Control Act within the geographical limits of the City in instances where the Act is more stringent than the Code. Air Management Services employs air pollution inspectors who, among other duties, investigate complaints of violations of the odor regulations of the Air Management Code and the Air Pollution Control Act. The air pollution inspectors receive special training in odor detection as to the type and intensity of odor that would constitute a violation of the Air Management Code and/or the Pennsylvania Air Pollution Control Act. The Air Management Code defines "odor" as follows:

> Smells or aromas which are unpleasant to persons or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract or create symptoms of nausea or which by their inherent chemical or physical nature or method of processing are or may be detrimental or dangerous to health.

Air Management Code § 3-102(25). Any emission of an "odor," as so defined, constitutes a public nuisance under the

Air Management Code, which, if detected by an air pollution inspector, would constitute a violation of the Air Management Code. According to the evidence adduced to the original trial held in May 1986, an inspector may make a finding of a violation only if he detects a malodor sufficiently strong to constitute a violation as of the time of the investigation or inspection. There are no scientific instruments or tests for ascertainment of malodors, and a determination of a violation is based on an individual inspector sensing the violation through his or her own sense of smell.

During the four-month period following the injunction imposed on July 25, 1986, Air Management Services issued 28 notices of violation to the NeWPCP. Of those notices, the intensity of the odors were characterized by the air pollution inspectors as follows: 13 were for light odors, 3 were for mild or moderate odors and 12 were for strong odors. The City, through witnesses employed by the Philadelphia Water Department and the NeWPCP, contends that seven of the violations were issued for Nocardia-related events; four were attributable to equipment failure; three were caused by overstockpiling of sludge; five were alleged to be disputed by the City without specification as to which of the 28 violations were in dispute and nine were unexplained. Of those nine, two violation notices were issued for distinct odors, two were for strong odors, four were for light odors and one was for a mild odor.

Essentially, the City's argument appears to be that the notices issued by Air Management Services for violations of the Philadelphia Air Management Code do not automatically equate to violations of the injunction because many of the notices were issued for only light, mild or moderate odors. In addition, the City argues that the issuance of a notice of violation does not automatically constitute a violation of the injunction because the air pollution inspectors always issue a notice of violation, whenever, on inspection, they detect any malodor, no matter how light, fleeting or insignificant.

The City's assertions are unpersuasive for the following reasons. First, the record establishes that since the entry of

the order, there have been no less than 12 occasions when air pollution inspectors identified strong odors. The evidence from the hearing is also clear that the City itself acknowledges that there have been frequent occasions since entry of the order when there have been malodors emitted from the plant in excess of what the City contends are normal and unavoidable odors arising from a sewage treatment plant. Second, the injunction expressly prohibits the emission of odors that "cause injury, harm, annoyance or discomfort to persons of normal sensibilities." To be a violation of the Philadelphia Air Management Code, the detected odor must be "unpleasant to persons" or must, "tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract or create symptoms of nausea or ... be detrimental or dangerous to health." Air Management Code § 3-102(25).

Based on this definition, an odor that is cited by Air Management Services as a violation of the Air Management Code is, by its very nature, an odor causing "injury, harm, annoyance or discomfort to persons of normal sensibilities." A violation of the Air Management Code would therefore also be a violation of the prohibition contained in the injunction, regardless of whether a detected odor is classified as light, mild or moderate. Based on the foregoing, there can be no doubt that the injunction against emissions of malodors has been violated many times in the four months between the date of the issuance of the injunction and the contempt hearing.

The City argues that, despite the issuance of numerous odor emission violations, it should not be cited for civil contempt of the July 25, 1986 Order because the majority of the malodor violations issued since July were "due to factors outside the realm of prevention of or control by defendants, including the occurrence of Norcadia [sic] ... as well as the mechanical failure of two components of the City's equipment and two mechanical failures of an independent contractor's dewatering equipment." (Defendant's response to plaintiffs' post-hearing memorandum at 3-4).

To establish civil contempt, it is not necessary to establish that the noncomplying party acted willfully or in bad faith. *McComb v. Jacksonville Paper Co.*, 336 U.S. 187, 191 (1949); *Delaware Valley Citizens' Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F. Supp. 869, 880 (E.D. Pa. 1982). The absence of willfulness does not relieve a finding of civil contempt because the purpose is not to punish the contemnor but rather to enforce compliance with an order of the court or to compensate for losses or damages sustained by reason of noncompliance. *McComb*, 336 U.S. at 191; *United States v. United Mine Workers*, 330 U.S. 258, 303-304 (1946); *Quinter v. Volkswagen of America*, 676 F.2d 969 (3d Cir. 1982). In order to find a party in civil contempt, there must be a specific and definite order of court which that party has violated, having actual knowledge of the order and the ability to comply. *Thompson v. Johnson*, 410 F. Supp. 633, 640 (E.D. Pa. 1976), *aff'd*, 556 F.2d 568 (1977); *United States Steel Corp. v. United Mine Workers of America*, 393 F. Supp. 942, 947 (W.D. Pa. 1975); *Frankford Trust Co. v. Allanoff*, 29 Bankr. 407, 409 (E.D. Pa. 1983). Thus, where a valid order has been entered, the party enjoined has the duty to comply with the order.

In this case, there is no contention that compliance with the July 25, 1986 Order is impossible or even not feasible. The defendant City argues that it is impossible to operate a sewage disposal plant in such a manner that it will not emit any odors, and that there will always be some persons who will find even such normal and inevitable odors objectionable. However, there is no contention that a sewage disposal plant cannot be operated without emitting offensive and objectionable odors that "cause injury, harm, annoyance or discomfort to persons of normal sensibilities." Thus, it is quite apparent from all the evidence that was presented at the hearing that the City has repeatedly violated the July 25, 1986 injunction during the past four months.

Since the purpose of a civil contempt proceeding is to bring about future compliance with an order of court and to compensate for past violations of the order, where there is a

finding of civil contempt, all of the surrounding circumstances of the case should be considered when determining an appropriate remedy. The court should consider among those factors, the extent to which the party in contempt may be considered to be at fault; what reasonable steps could and should have been taken to prevent the violations from occurring, what steps can be taken to prevent future violations, and how extensive the violations were, both in frequency and extent of harm.

In fashioning remedial relief in civil contempt proceedings, the district court is vested with wide discretion. *In re Arthur Treachers Franchisee Litigation*, 689 F.2d 1150, 1158 (3d Cir. 1982); *Delaware Valley Citizens Council for Clean Air*, 533 F. Supp. at 882. The relief granted may be compensatory and/or coercive and often takes the form of a fine in the amount of the damages sustained by a petitioner. *See, e.g., Quinter v. Volkswagen of America*, 676 F.2d at 975; *Thompson v. Johnson*, 410 F. Supp. at 633. In exercising its remedial powers, a court may also require a contemnor to perform various affirmative acts, even though those actions were not mandated by the underlying decree. *In re Arthur Treacher's Franchisee Litigation*, 689 F.2d at 1159; *NLRB v. J.P. Stevens & Co., Inc.*, 563 F.2d 8 (2d Cir. 1977), *cert. denied*, 434 U.S. 1064 (1978); *Franklin Mint Corp. v. Franklin Mint, Ltd.*, 360 F. Supp. 478 (E.D. Pa. 1973).

In determining appropriate sanctions, I am most concerned with trying to remedy the situation so that there will not be continuing future violations.

The City has presented evidence, and argues that the NeWPCP is well-maintained, well-operated and well-designed. Consequently the City contends, in effect, that although there may have been some violations in the past, there should be no sanctions imposed, and no finding of contempt. The difficulty with that argument is that all of the evidence and all witnesses who testified on the subject agreed that a properly designed and properly maintained and operated sewage disposal plant will not emit malodors of the type prohibited by the injunction and the Air Management Code.

Consequently, the only logical explanation for the continuing ongoing violations is that the plant is improperly or inadequately designed, maintained and/or operated. In other words, the sewage disposal plant's design, maintenance and/or operation can feasibly and reasonably be improved to the point where violations, absent some totally unforeseeable, fortuitous circumstance, will not occur.

Plaintiffs have suggested various possible remedies, including an ambitious program whereby the court forces the City to design and build complete enclosures over all open areas of the plant. The City continues to contend that it has spent approximately $300,000,000 in improvements and that the plant, as presently designed and built, contains the best "state-of-the-art" odor pollution controls available. Although it may be that eventually the proposal of plaintiffs will be the best, or possibly the only way to prevent odors from escaping, the evidence is insufficient at this stage to require such a radical program.

The City has proposed that an independent, nationally recognized engineering entity which specializes in the field of odor pollution control in sewage disposal plants be appointed by the court to conduct a comprehensive survey to determine what can be done to eliminate the existing odor pollution problems at the NeWPCP. This is an acceptable proposal which has been agreed to and expanded upon by the plaintiffs. However, because such an evaluation would extend over a period of at least several months, there is no reason to accept this as the total solution. An order accompanying this memorandum will therefore provide certain additional controls. Specifically, the order will provide that three or more valid notices of violation issued by Air Management Services within any continuous thirty-day period of time shall, without further proof, be deemed a violation of the injunction and will subject the City of Philadelphia to a penalty of $10,000 for each occasion of three or more such notices, to be placed in a special fund to compensate the named plaintiffs for the injury caused.

Although compensation for past violations would be per-

fectly appropriate in this case, the evidence upon which to base any monetary amount of damages for the harm done is very scant if existent at all. Nothing in the prior order suggested that any specific penalty would be involved for any violation and there has been no showing, by way of affidavits or other competent evidence, of any actual monetary loss or damages suffered by the plaintiffs due to the continuing violations.

A finding of contempt does not automatically require the imposition of sanctions and an assessment of damages against a contemnor can only be made once actual damages resulting from the contempt are shown. *Thompson v. Johnson*, 410 F. Supp. at 643. In addition, any fine imposed for civil contempt must not exceed the actual damages caused the offended party by a violation of the court's order, *United States v. United Mine Workers*, 330 U.S. at 304; *Quinter v. Volkswagen of America*, 676 F.2d at 975; and the offended party must prove his or her damages by clear and convincing evidence. *Nelson Tool & Machine Co. v. Wonderland Originals, Ltd.*, 491 F. Supp. 268, 269 (E.D. Pa. 1980); *Thompson v. Johnson*, 410 F. Supp. at 643; *aff'd*, 556 F.2d 568 (1977).

Since the record is presently void of any evidence sufficient to establish the amount of damages sustained by plaintiffs as a result of the violations, compensatory relief for past violations will not be assessed at this time. This, however, does not foreclose the possibility of a compensatory fine being imposed in the future upon a showing, by clear and convincing evidence, of actual loss suffered by plaintiffs due to the City's continued violation of the injunction.

I, therefore, conclude that the defendants are in civil contempt of this court's injunction order of July 25, 1986, and that the coercive sanctions set forth in the accompanying order will be imposed.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCERNED CITIZENS OF BRIDESBURG, et al.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al.	:	NO. 85-14

ORDER

Upon consideration of plaintiffs' motion to declare defendants in civil contempt and after a full evidentiary hearing and full briefing, for the reasons set forth in the accompanying memorandum, it is

Ordered as follows:

1. Defendants, the City of Philadelphia, James S. White (Managing Director of Philadelphia), and William J. Manazzo (Water Commissioner of Philadelphia) are declared to be in civil contempt of this court's order of July 25, 1986 which, *inter alia*, enjoined defendants from maintaining and operating the Northeast Water Pollution Control Plant of the City of Philadelphia (NeWPCP) in violation of the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code and regulations adopted pursuant to said Act and Code; the said defendants having failed to maintain and operate the NeWPCP in such a manner as to prevent the emission into the ambient air of malodors of such intensity, quantity and concentration as unreasonably to cause injury, harm, annoyance or discomfort to persons of normal sensibilities who are not on the land of the NeWPCP.

2. Henceforth, three (3) or more valid notices of violation of the Pennsylvania Air Pollution Control Act and/or the Philadelphia Air Management Code issued by Air Management Services within any thirty (30) day period shall be deemed a violation of the injunction. Upon each such occurrence of three (3) or more violations within a thirty (30) day period, the City of Philadelphia shall pay a coercive penalty of

$10,000 into the Registry of this Court, to be held for the benefit of persons injured or harmed by any violation of the injunction, the distribution of such sums to be subject to further order of this court, to be determined by such further proceedings as may be required.

3. The defendants shall, within thirty (30) days from the date of this order, employ, at defendants' expense, as an independent engineering consultant, the firm of Malcolm Pirnie, Inc. The said firm shall, for all purposes, be entirely independent from and impartial toward both plaintiffs and defendants. The said firm shall make a comprehensive, independent study of all aspects of odor pollution problems and odor pollution control and prevention of emissions of malodor emissions from the NeWPCP. The study shall include, but not be limited to, the following:

(a) Study each and every phase of the NeWPCP including Junction Chamber A, Preliminary Treatment Building, Primary Settling Tanks (both new and old), Aeration Tanks (Rotating Biological Contractors), Digesters, Sludge Dewatering and Thickening, Sludge Lagoons, Scum Incinerator, Grit and Screenings Incinerator, Sludge and Ash transportation and disposal, and Ozonator systems. The study shall include an analysis of the history and future potential for preventing malodor emissions including the adequacy and efficiency of both the existing facilities, and the planned and scheduled repairs and additions.

(b) Evaluation of present maintenance and operating procedures and the adequacy of the same to prevent malodor emissions, including the capabilities, staffing, training and supervision of plant personnel including management personnel insofar as relevant in prevention of malodor emissions.

The Consulting firm shall have access to all records, logs, reports and documents involving the NeWPCP of the City of Philadelphia, and any and all agencies and officers of the City of Philadelphia, including employment and personnel records of employees, past and present, as well as supervising and management personnel of the NeWPCP insofar as relevant in

determining causes, responsibility and remedies for malodor emissions of the NeWPCP.

The Consulting firm may confer with whomever it deems appropriate including any and all employees of the NeWPCP, elected and appointed officials of the City of Philadelphia, all agencies of the City of Philadelphia, any contractors and suppliers of the NeWPCP, the attorneys for plaintiffs and defendants (either together or separately), and the individual plaintiffs and other residents of the City of Philadelphia.

The Consulting firm shall consider and evaluate recommendations, if any are submitted to it, as to methods for eliminating or reducing malodor emissions.

In the event that the Consulting firm finds that even if the present plant is, or can be, properly maintained and operated, malodor emissions in violation of the injunction will continue, the Consulting firm shall make such recommendations for changes, additions or improvements as will prevent such malodor emissions, together with an estimate of cost and time for implementing such recommendations.

The Consulting firm shall make a report to the court, together with copies to the plaintiffs' and defendants' attorneys within three (3) months from the date of employment. No portion of the report shall be provided to or discussed with representatives of either plaintiffs or defendants prior to submission to the court.

4. All prior terms and conditions of the injunction heretofore issued shall remain in full force and effect.

BY THE COURT:

/s/
Donald W. VanArtsdalen, S.J.

January 28, 1987

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OPINION AND ORDER

VanARTSDALEN, S.J. July 25, 1986

Findings of Fact

The Northeast Water Pollution Control Plant

1. The Northeast Water Pollution Control Plant (Northeast Plant) is located on a roughly square tract of land, containing approximately forty-five acres. The main entrance is at the intersection of Wheatsheaf Lane and Richmond Street in the so-called Bridesburg area of the City of Philadelphia, Pennsylvania. The Northeast Plant is situated a short distance south of the Betsy Ross Bridge, and is generally east of U.S. Route I-95, extending from Richmond Street southeastwardly to Delaware Avenue between Castor Avenue and Lewis Street.

2. The neighborhood surrounding the Northeast Plant contains a mixture of residential, commercial and industrial land uses. The intervenor-defendants, Rohm and Haas Company and Allied Corporation, both own and operate large industrial chemical manufacturing plants in close proximity. There are also other industries in the vicinity, including a smelting plant and a rendering plant. Most of the individual plaintiffs are residents of the neighborhood.

3. The Northeast Plant is a sewage treatment and disposal plant. Its primary function is to process the liquid

wastes from the sewer systems of the northeastern areas of Philadelphia. It also receives influent from some sewer systems serving areas of Bucks and Montgomery counties. Its daily influent includes both storm sewer and sanitary sewer liquid wastes. Both of the intervenor-defendants discharge industrial liquid wastes into sewers that carry the sewage to the Northeast Plant.

4. The present plant capacity can process 210 million gallons per day. The industrial wastes processed by the Northeast Plant constitute approximately seven percent of the normal total dry weather flow of influent. The plant's total capacity is adequate for all present and reasonably foreseeable future uses.

5. The Northeast Plant has operated as a sewage treatment and disposal plant continuously since at least 1923. In the early 1950's the plant underwent substantial renovations. As the result of extensive litigation commenced in 1978 involving the City of Philadelphia, the Environmental Protection Agency, the Delaware River Basin Commission and various other entities and individuals, a consent decree was filed on May 30, 1979 and approved by Hon. J. William Ditter, Jr., of this court on September 21, 1979. The decree required extensive reconstruction and upgrading of the facilities of the Northeast Plant in order to comply with various standards, primarily involving the Clean Water Act, 33 U.S.C. § 1251 *et seq.*, as to the effluent that was being discharged by the Northeast Plant into the Delaware River. The capital expenditures by the City of Philadelphia in carrying out the renovations have exceeded Three Hundred Million Dollars. As of the time of the trial of the present case, most of the planned reconstruction was completed, and the renovated system was in operation. Certain malfunctioning equipment remained to be corrected and some additional processing equipment had yet to be installed and tested.

6. The Northeast Plant is one of three sewage treatment and disposal plants located in the City of Philadelphia. These plants are all under the operation and control of the Water Department of the City of Philadelphia.

Procedural Background of the Case

7. The plaintiffs consist of a nonprofit corporation, Concerned Citizens of Bridesburg, and a group of approximately 130 individuals. The individual plaintiffs all live in the vicinity of the Northeast Plant and allege injury and harm from malodors being emitted from the Northeast Plant. Concerned Citizens of Bridesburg is incorporated under the laws of Pennsylvania and its members are residents of the Bridesburg area of Philadelphia. The complaint was filed on January 3, 1985. Plaintiffs seek to enjoin defendants from operating the Northeast Plant "in violation of the Clean Air Act, 42 U.S.C. § 7401 et seq." The sole alleged claim for federal jurisdiction is the "citizen lawsuit provision of the Clean Air Act, 42 U.S.C. § 7604 and 28 U.S.C. § 1331." Neither the complaint nor the amended complaint (filed April 12, 1985) expressly assert a claim based on any other federal statute, nor on the basis of any violation of state statutory or common law, and there is no request contained in the complaint or amended complaint that the court hear or determine any state claim on the basis of pendent jurisdiction. The relief sought is solely equitable injunctive relief.

8. As required by the Clean Air Act, 42 U.S.C. § 7410, Pennsylvania adopted, and the Administrator of the United States Environmental Protection Agency (EPA) approved, a State Implementation Plan (SIP). The Pennsylvania SIP, as approved (40 C.F.R. § 52.2020), incorporated the Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, and state regulations adopted pursuant to the Act, and also incorporated the Philadelphia Air Management Code and regulations adopted pursuant to the Code. In substance, both the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code, and the regulations adopted pursuant to the Act and the Code, prohibit malodorous emissions that constitute an air pollution nuisance, defined in part as being an emission of an air contaminant (which includes malodors) that tends to interfere with health, repose or safety or causes severe annoyance or discomfort or is offensive, objectionable

or both to persons because of inherent chemical or physical properties of the emission.

9. Defendants moved to dismiss the complaint contending that the State and City odor emissions controls could not properly be included in a federally approved SIP adopted pursuant to the Clean Air Act, and therefore could not be enforced in federal court by a citizen's complaint filed under 42 U.S.C. § 7604. The motion to dismiss was denied by memorandum opinion and order dated April 23, 1985.

10. On May 11, 1985, defendants sought both a reconsideration and stay of proceedings. Defendants contended that EPA recognized that it had exceeded its authority in approving the Pennsylvania SIP that incorporated by reference State and City odor regulations and that EPA was in the process of promulgating a regulation that would withdraw approval of such portions of the Pennsylvania SIP. Defendants asserted that when EPA would thus "correct" the error, this court would lose jurisdiction under the Clean Air Act. The motions for reconsideration and a stay were denied.

11. On May 2, 1986, after public notice and hearing, EPA officially approved a revision to the Pennsylvania SIP, which effectively eliminated from the Pennsylvania SIP all odor emission control regulations. In so doing, EPA concluded that such regulations have "no significant relation to the attainment and maintenance of the National Ambient Air Quality Standards (NAAQS)." EPA further concluded that "there is no direct or indirect relationship between the State odor emission regulations cited below and any criteria pollutant." The revision was to be effective thirty days from date of publication in the Federal Register. Publication occurred on May 20, 1986 (Fed. Reg. 18438). Although the revision would be effective as of June 19, 1986, plaintiffs have filed with the Administrator of EPA a request for a stay pending review. On June 20, 1986, plaintiffs filed a petition for review with the United States Court of Appeals for the Third Circuit.

12. On March 24, 1986, plaintiffs moved to amend the complaint to allege a violation of Air Management Regulation V, Section X—Odors of the Pennsylvania SIP. The stated

reason for the motion was that this regulation was not proposed for revision or deletion by EPA and would therefore be a valid basis for this court retaining federal jurisdiction even if the EPA revision was upheld as valid. Although the motion to amend was granted, plaintiffs, in fact, never filed the proposed second amended complaint and the case proceeded to trial on May 5, 1986 without such amendment. In any event, the EPA revision of the Pennsylvania SIP, as finally adopted, also eliminated Air Management Regulation V, Section X from the SIP.

13. On October 22, 1984, more than 60 days prior to filing this action, plaintiffs notified the then Managing Director of the City of Philadelphia, Leo A. Brooks, by certified mail, of intention to file this action charging the defendants with violation of the air emission regulations of the Clean Air Act, 42 U.S.C. § 7401 *et seq.* The notice expressly advised that the Northeast Plant would be alleged to be operating in violation of applicable air emission regulations of the Pennsylvania SIP, including regulations promulgated under the Pennsylvania Air Pollution Control Act, 35 P.S. § 4001 *et seq.*, 25 Pa. Code § 123.31, and various specified provisions and regulations of the Philadelphia Air Management Code. Copies of this notice were also mailed to the following: William Ruckelshaus, Administrator of EPA; Thomas Eichler, Administrator of Region III, EPA; Leo Gonshur, Director of the Pennsylvania Department of Environmental Resources; William J. Marrazzo, Commissioner of the Philadelphia Water Department; Kenneth S. Cooper, Deputy City Solicitor for Environmental Affairs for the City of Philadelphia; William Reilly, Assistant Health Commissioner for the City of Philadelphia; Richard Thornburgh, Governor of Pennsylvania; W. Wilson Goode, Mayor of Philadelphia; Nicholas DiBenedictis, Secretary of the Pennsylvania Department of Environmental Resources.

14. No notice or copy of a notice was ever sent to the Attorney General of Pennsylvania. Before a resident of Pennsylvania may file a private action under the Pennsylvania Air Pollution Control Act to abate a nuisance or restrain or pre-

vent a violation of the Act, thirty days' notice of intention to so proceed is statutorily required to be served upon the Attorney General of Pennsylvania. 35 P.S. § 4010(f).

Odor Pollution Control

15. Air Management Services, a division of the City of Philadelphia, Department of Public Health, is charged with the duty of enforcing the Air Management Code of Philadelphia and the regulations promulgated pursuant to the Code. Air Management Services also enforces the Pennsylvania Air Pollution Control Act within the geographical limits of the City of Philadelphia, in the specific instances that the Act is more stringent than the Code.

16. William Reilly is the Assistant Health Commissioner for Air Management Services for the City of Philadelphia. He has held this position since 1972. Air Management Services employs approximately twelve full-time air pollution inspectors who, among other duties, investigate complaints of air pollution, including complaints of violation of the odor regulations of the Air Management Code and Air Pollution Control Act. Air pollution inspectors are available, or at least on call, to make investigations of complaints and to make inspections twenty-four hours a day, seven days a week. During regular week-day working hours (Mondays through Fridays from 8:30 a.m. to 5:00 p.m.), approximately ten inspectors are available. From 5:00 p.m. to 8:30 a.m. on week-days and all the hours of Saturdays and Sundays, there is only one inspector on call to answer complaints. The air pollution inspectors' area of responsibility covers all of Philadelphia, and includes inspecting all complaints of air pollution from whatever source or area of the City and of all types, including odor pollution. The Northeast Plant operates continuously, *i.e.*, twenty-four hours per day, every day of the year.

17. Air pollution inspectors receive special training in odor detection as to the type and intensity of odor that would constitute a violation of the Air Management Code and/or the Pennsylvania Air Pollution Control Act. The Air Management Code defines "odor" as follows:

> Smells or aromas which are unpleasant to persons or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract or create symptoms of nausea or which by their inherent chemical or physical nature or method of processing are or may be detrimental or dangerous to health.

Any emission of an "odor," as so defined, constitutes a public nuisance under the Air Management Code, which, if detected by an air pollution inspector, would constitute a violation of the Air Management Code. Written notice of the violation, signed by the air pollution inspector would be provided to the owner or possessor of the land or facility from which the emission emanates, if the inspector is able to make such a determination. An inspector may make a finding of a violation only if he detects a malodor sufficiently strong to constitute a violation as of the time of the investigation or inspection. There are no scientific instruments or tests for ascertainment of malodors, and a determination of a violation is based on individual inspector's sensing the violation through his own sense of smell.

18. On each inspection where there is a determination of a violation, the air pollution inspector is required to complete a written form that notes, inter alia, the complainant's name and address, the time, the facility emitting the odor, whether a violation was determined to exist and, if so, its duration together with the inspector's statement of his observations, the person contacted at the offending facility, together with such person's explanation, if any, and the date and name of the inspector.

19. Based on records of Air Management Services, inspectors made determinations and filed written reports of violations by the Northeast Plant of the odor provisions of the Air Management Code and/or the Pennsylvania Air Pollution Control Act five times in 1983; fifty-five times in 1984; 107 times in 1985 and eight times in 1986 to the date of trial. The records of the Water Department, which received notices of

violations, show a slight deviation from these figures. The records further establish a significantly higher number of complaints made, usually by residents of the area living in close proximity to the Northeast Plant, than violations determined by the inspectors. This difference between the number of complaints and the number of violations as determined by the inspectors is accounted for in two major ways: first, the time lapse between the complaint and the inspection caused, in some instances, the odor to dissipate; second, the complainant's sense of smell suggesting a violation did not always agree with the inspector's sense of smell. To constitute a violation, malodors discharged into the ambient air by the Northeast Plant have to be of sufficient strength to cause an odor violation on adjoining properties beyond the boundaries of the Northeast Plant.

20. By far, the greatest number and frequency of complaints and determinations of violations occurred between May 1984 and July 1985. It was during this period of time that the most extensive amount of renovation of the plant was being undertaken. From August 1985 through the end of the calendar year 1985, there were twelve violations determined upon eighteen complaints. In 1986, there were no complaints or violations for the months of January and February; there were ten complaints with seven violations noted in March, and five complaints with one violation noted in April. In March 1986, electrical circuits in the Northeast Plant malfunctioned and, as a result, the primary sedimentation tanks could not properly be pumped to remove the settled solids, which proceeded to decay causing a severe odor problem for approximately one week.

21. The odors emanating from the Northeast Plant were graphically described by individual plaintiff-witnesses who lived in the vicinity, all of whom testified to the adverse effects the odors had upon them and/or their family and friends. The adverse effects were both physical and emotional.

22. Joseph Anderlonis, pastor of a church located approximately one-quarter of a mile from the Northeast Plant,

detected at least four types of odors in the ambient air: (1) a sulfur odor; (2) a caustic glue odor; (3) a sour sewer smell; and (4) a stagnant water or liquid odor. He attributed the sour sewer smell to the Northeast Plant. He further described that smell to be like a combination of sewer gas and a sour gaseous smell that comes from human vomit. At certain times of the year, he had to keep the windows of his living quarters closed. The odors have adversely affected him psychologically but not physically. The frequency of the odors diminished during the winter of 1985-1986, but he detected such odors twice in 1986.

23. Sharon Francis, an area resident for five years, has noticed odors coming from the Northeast Plant, from Franklin Smelting and from the Keystone Rendering Plant, each of which has a distinct smell. She described the smell from the Northeast Plant as "like a diaper pail that has been sitting with a lid on it for about three weeks." It disturbs her children who may be playing outdoors. The odors from the Northeast Plant cause her son to cough a great deal, and embarrass her if friends visit her. She cannot open the windows of her home, or hang her laundry outside without the odor permeating into the cleaned laundry and into the house. This type of odor has been present at least once a week during the last five years.

24. Mary Elton, another area resident, has lived in the vicinity for thirty-eight years. She has noticed odors coming from the Northeast Plant, Franklin Smelting, Rohm and Haas and Allied Corporation. The odors coming from the Northeast Plant smell to her like "a garbage bucket that's been in the sun all summer without being cleaned." She is usually away from her home and the neighborhood during the daytime. When the odors occur while she is home, she closes the house and remains inside. The odors make her nauseous and unable to breathe normally. The odors have in the past occurred about five times per month, but have been less frequent in 1986. The odors became worse when the renovations and rebuilding of the plant commenced.

25. Frances Pfeiffer, another resident of the Bridesburg area, lives directly across from the Northeast Plant. She has

noticed odors that smell like "human waste" coming from the Northeast Plant. It makes her feel sick. She is unable to entertain company and relatives at her home when the odors are strong. Joseph Pfeiffer, her husband, described the odors as smelling exactly like an "outhouse." The odors cause him to suffer from nausea and headaches.

26. James Coppola has lived on Richmond Street directly across from the Northeast Plant for fifteen years. The area is zoned residential and a request by him for a zoning change to commercial was turned down ostensibly because he lived in a "fine residential area." In addition to odors from the Northeast Plant, he has noticed odors coming from "Franklin Smelting, Unitank, and occasionally, Keystone Rendering." The odor from the Northeast Plant was described by Mr. Coppola as "Terrible. Like open sewer, gassy odor sometimes. Chemical odor sometimes. A urine type odor sometimes." The odors cause him to feel nauseous and he gets headaches. It prevents outdoor barbecues. If it occurs on a weekend, he and his family usually leave the neighborhood.

27. Susan Larsen, who has lived a short distance from the Northeast Plant for the last seven years, has noticed odors from the sewage plant that smell like human waste and "a dirty outhouse." She has noticed these odors while traveling along U.S. Route I-95 on occasion. She believes the odors cause her serious headaches. Her children do not want to stay outside because the odor "is so bad."

28. Robert Kumosinski has lived close to the Northeast Plant for about twelve years. He has detected odors arising from Allied Chemical [Allied Corporation] and Rohm and Haas and from the Northeast Plant. Mr. Kumosinski lives about one mile from the plant, where the odor is nevertheless quite strong when the prevailing winds are blowing from the Northeast Plant toward Mr. Kumosinski's home. The odors can make one feel sick and queasy in the stomach and produce headaches. One particular "gaseous type odor" that comes from the Northeast Plant causes his eleven-year old son to turn white and immediately complain of a headache,

thereby frightening Mr. Kumosinski. The odors have been noticed by him while traveling on U.S. Route I-95.

29. John Belland lives near the Northeast Plant on Richmond Street adjoining U.S. Route I-95. The Northeast Plant is directly behind his house. Although he has noticed odors from Keystone Rendering, Rohm and Haas and Franklin Smelting, the worst odor comes from the Northeast Plant. The odor, when present, requires that he close all the windows of his house, makes him nauseous, tired and listless, and on occasions he leaves the vicinity.

30. The official records of Air Management Services establish that, at least since 1984 to the date of the trial, there have been frequent and continual violations of the Philadelphia Air Management Code and the Pennsylvania Air Pollution Control Act and the respective regulations in that the Northeast Plant has caused foul-smelling odors to escape into the ambient air and spread onto adjoining properties in the neighborhood. Defendants and intervenor-defendants offered no evidence to the contrary, but instead offered evidence by way of explanation for the violations.

31. Air Management Services has been responsive to citizen complaints, and upon receipt of a complaint by telephone, in most cases will make an on-site investigation within fifteen minutes to one hour from the time of the complaints. All of the resident citizen witnesses who testified on behalf of plaintiffs, testified, in effect, that most, if not all, complaints were promptly responded to by Air Management Services, although the inspector frequently would not determine that there was an odor violation as of the time of the inspection, and often disagreed with the complainants as to the intensity of the bad odors.

Improvements to the Northeast Plant

32. During or about 1983, the major construction for renovating and upgrading the Northeast Plant commenced. As of the time of the trial of the case, most of the contemplated work had been completed. Some additional construction is required. Not all of the "improvements" were fully tested or

operational at the time of the trial. Under the terms of the consent decree, the work should have been completed and the renovated plant completely operational before the date of trial.

33. One of the major sources of malodors arising from the Northeast Plant was the so-called Grit Building, where raw sewage initially entered the plant. That building is no longer in service, although it remains intact and, due to some leakage, infiltrate does go into the Grit Building and has to be pumped out. Plans, indefinite as to exact time, are to block the leak and completely shut down the Grit Building.

34. The Grit Building has been replaced by a so-called Preliminary Treatment Building, a four-story structure that contains many improvements over the Grit Building; including, inter alia, influent from the sewer lines being completely enclosed, above ground air exhaust, greater area within the building for disposal of malodorous molecules, more adequate heating, and ozonators to process the odors (not functioning at the time of trial). In addition, the Preliminary Treatment Building has two multiple hearth incinerators, designed to incinerate grit screenings from the preliminary treatment process and detriter process. These grit screenings were, as of the time of the trial, still being stored and hauled away by truck, because the incinerators had not yet been made operational. The hauling process is a constant potential source of odor pollution.

35. Another major cause of odors arising from the Northeast Plant had been the sludge heaters, a submerged combustion process that applied a flame directly into the sludge. The sludge heaters have been replaced by fully enclosed tube heat exchangers, eliminating the direct flame-burning process and thereby reducing odors from the heating process. The open flame sludge heaters were taken out of service in August of 1985.

36. Entirely new digestors have been installed, all of which now have fixed covers, rather than the floating type of covers formerly utilized.

37. The number and capacity of the settling tanks have been increased. As a result, there should be less build-up of

odor-causing scum. Also, the frequency of taking a tank out of service and draining it for repairs and maintenance will be reduced. Such maintenance of a tank is a cause of odor problems. As a part of the renovations, both the influent and effluent portions of the primary settling tanks have been enclosed, where turbulence may cause odors, and these buildings have ozonators.

38. The treating process also requires aeration by means of rotating biological contactors. New ones were installed but were found to contain design defects when placed in operation in mid-1985. The contractor repaired the defects and this portion of the renovated system is now fully operational.

39. Sludge from the settling tanks is presently being dewatered into a semi-solid state and then transported by truck to the Southwest Water Pollution Control Plant for final disposition. It is planned that this sludge will in the future be transported by pipeline a short distance to the Delaware River where it will be pumped unto barges and transported by barge to the Southwest Water Pollution Control Plant. The present system causes some odors during the transportation.

40. The renovations to the Northeast Plant when finally completed and operating as intended should reduce to a minimum any malodors emanating from the Northeast Plant caused by the processing and treatment of the sewage, whether such odors are caused by the biological processes of decomposition of the sewage or from volatile chemicals and other organic sewage material. However, as of this time, the renovations are not yet complete and defendants have not presented any evidence that they will be completed pursuant to any fixed timetable.

Chemical Sources of Odors

41. The Northeast Plant accepts into its plant industrial sewage, including chemical discharges from various industrial plants, subject to limitations imposed under the Clean Water Act. Certain of these discharges include volatile organic chemicals, many of which when released as gases into the ambient air produce strong unpleasant and harmful odors.

42. Chemical odors have frequently been noted by employees working within the old Grit Building. When such odors are detected, the employees are advised to evacuate the building, because such chemicals can have toxic effects on humans and also because certain of them, when sufficiently concentrated, cause a danger of explosion upon ignition. Tests made by the Water Department's Industrial Waste Unit at these times showed air samples of volatile organic substances in the Grit Building far in excess of recognized odor detection levels.

43.. Several of the resident witnesses on behalf of plaintiffs testified to various occasions when they detected chemical odors, as distinct from sewage odors, coming from the Northeast Plant.

44. Air Management Services conducted a series of tests over the course of a year, from October 1984 through September 1985, by simultaneously taking ambient air samples both upwind and downwind at the fencelines of the Northeast Plant. There being no scientific test for odors, the tests were for certain detectable gases, mostly volatile organic chemicals. The results of these tests failed to show that any substances were in the air downwind from the plant in sufficient concentration to be within the range generally accepted by experts in the field as being odor-recognizable to a person with a normal sense of smell. At least one of these tests was conducted when there was a known chemical spill that had entered and was in the Northeast Plant.

45. A chemical spill is a non-permitted discharge, whether accidental or intentional, of a chemical substance into the sewer system, either by reason of the quantity, concentration or type of substance. A chemical spill of some volatile organic substances, when in sufficient concentration, can and does cause chemical malodors within the Northeast Plant. These malodors can and have been discharged through the sewage treatment process and through artificial ventilation of certain of the buildings, especially the old Grit Building, into the ambient air in such concentration as to cause the malodors to cross over the boundaries of the Northeast Plant

into adjoining and neighboring properties, including residential properties of the plaintiffs.

46. Of a total of 189 inspection reports prepared by air pollution inspectors that were received in evidence, two of the reports, occurring in late 1984, made specific reference to chemical odors detected.

47. One of the odors claimed by some of the witnesses to have been detected in the air beyond the boundary of the Northeast Plant was cumene.

48. The Industrial Waste Unit of the Water Department, as one of its functions, seeks to determine the sources of volatile organic compounds that arrive through the sewer lines as influent in the Northeast Plant. The Industrial Waste Unit determined that in 1983 and 1984 there was a problem with cumene originating at the plant of intervenor-defendant, Allied Corporation. With cooperation from Allied Corporation, it was determined that cumene in the ground water on Allied Corporation's land was infiltrating directly into the industrial waste sewer lines of the plant. The problem was corrected by developing a system of drawing off the excess ground water containing cumene and otherwise preventing its infiltration into the sewer system.

49. Chemical spills have on occasion contributed to malodors in the neighborhood. They have been infrequent and have not been shown to have been caused by any industrial plant that has been permitted to discharge its industrial wastes into the sewer system, with the exception of the cumene infiltration traced to Allied Corporation's plant.

Summary of Air Pollution Violations

50. The records of the Water Department of the City of Philadelphia show that it received 177 notices of air pollution violations (violations of either the Philadelphia Air Management Code or of the Pennsylvania Air Pollution Control Act, or both) from January 1983 through to the end of April 1986. The records of the Air Management Services show a total of 175 notices of violations during that same period of time—an insignificant but unexplained discrepancy. In addition, there

were many more complaints of odor violations by persons living in the vicinity of the Northeast Plant that were investigated by air pollution inspectors, for which no formal notices of violation were issued.

51. Although the new plant is now in full operation, and has been since approximately late December 1985, very bad odors that are clear violations of the Philadelphia Air Management Code and the Pennsylvania Air Pollution Control Act continue to occur with substantial frequency. There are various causes of these continuing violations such as (1) improper maintenance, (2) equipment malfunction, (3) ozonators not properly functioning, (4) draining and repairing of old holding and sedimentation tanks.

52. The National Pollution Discharge Elimination System standards, applicable to the Northeast Plant, limit the discharge of suspended solids into the Delaware River to 62,600 pounds per day. In December of 1985, the Northeast Plant, pursuant to the consent decree, was to be in compliance with those standards. Tests showed that the Northeast Plant was discharging 110,000 pounds of solids per day and that it is not now and has never complied with the National Pollution Discharge Elimination System standards.

53. Ozonators are provided in the Preliminary Treatment Building and in the primary sedimentation tank buildings that enclose the turbulent areas of influent and effluent to the sedimentation tanks. As of the time of the trial, none of the ozonators nor the ozonating systems were operating or in operable condition. The Preliminary Treatment Building had been in operation for approximately eight months before the trial. Ozonators are intended to be an integrated part of the ventilation system for the buildings. Ozonators are designed to oxidize and thus eliminate odor causing substances in the air, before they are discharged from the buildings through the ventilating systems. Because they have not been as yet placed in operation, despite repeated unsuccessful attempts, it is not known how effective they will be in actual operation.

Discussion

The City of Philadelphia operates the Northeast Water

Pollution Control Plant through the City Water Department. The Northeast Plant has violated and continues to violate the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code by causing and permitting malodors to be discharged into the ambient air and carried unto land and properties beyond the boundaries of the Northeast Plant.[1] These malodors are frequent and intense. They have and continue to cause serious physical and emotional harm, annoyance and discomfort to residents of normal sensibilities living in the neighborhood surrounding the Northeast Plant. To the extent that the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code, together with their respective regulations are a part of the EPA-approved Pennsylvania SIP under the Clean Air Act, 42 U.S.C. § 7401 *et seq.*, the City of Philadelphia, as operator of the Northeast Plant has violated and continues to violate the federal Clean Air Act as well as the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code. The continuing and unreasonable discharges of malodors to the great harm, annoyance and discomfort of nearby residents and the public generally constitutes a continuing public nuisance.

The evidence is quite clear that highly obnoxious odors are frequently discharged into the air from the Northeast Plant. Defendants presented no evidence challenging or contradicting the many air pollution violations as determined by Air Management Services through on-site inspections by air pollution inspectors. The local residents who graphically testified as to the adverse effects the odors have upon them, their families and friends are completely credible. Obviously some persons are more sensitive to and offended by malodors than

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1. Subsequent to the trial, counsel sent copies of correspondence to the court. Although not a part of the trial record, it seems clear that residents are continuing to complain of malodors subsequent to the date of the trial and the City of Philadelphia admits that some odor problems at the plant have recently been created by malfunctioning equipment. The trial evidence establishes continuing odor problems to the date of trial. Air Management Services cited the Northeast Plant for violations during the month in which the trial was held.

other persons. Giving adequate allowance for varying degrees of sensitivity, the evidence clearly establishes that the neighborhood residents have been long suffering. They are not simply complaining about a petty annoyance, or a condition that cannot be alleviated by reasonable measures. They live in a residential area, as zoned by the defendant, City of Philadelphia. They are entitled to a quality of air consistent with such zoning and land use.

The evidence establishes that the Northeast Plant, as well as any other public sewage disposal system, if properly designed, constructed and operated, can serve its important public function without causing any serious odor problem in the neighborhood. Repeatedly, throughout the trial, defendants referred to the renovated and updated plant, when fully completed and properly operating, as being "the state of the art," meaning, of course, that the plant should be the most modern and efficient as is presently technologically possible. This contention appears reasonable in light of capital expenditures for the improvements, repairs and renovations exceeding Three Hundred Million Dollars. Every witness who testified on the subject, including defense witnesses, agreed that if the present plant, as renovated, is properly maintained and all systems and equipment are functioning properly and as intended, no odor air pollution should escape from the Northeast Plant into the ambient air in such quantity or concentration as to cause any serious annoyance or discomfort to any person or to impede any landowner in the rightful use and enjoyment of such landowner's property. Plaintiffs' expert witnesses, although "suggesting" some possible improvements to the system, provided no credible testimony that the design of the renovated plant or its component parts or systems should be altered or changed or that it was inadequate or defectively designed.

The defense focused primarily on the contention that the City of Philadelphia and its agencies and officials are doing the best it and they can to alleviate and eliminate odor problems. They further contend that all odor problems will be resolved satisfactorily if afforded sufficient time to work out

all of the "bugs" in the system. Without in any way questioning the good faith of these assertions by defendants, such assurances can have no more than a hollow ring to the neighbors who are forced by circumstances to live in the frequently occurring stench from the Northeast Plant and who have heard these assurances for well over three years with little or no apparent improvement.

One of the primary sources of malodors was the so-called Grit Building. According to the evidence, that building and its facilities were taken out of service in March, 1986. Log books of the operations within the Grit Building establish that the building and its processing of the sewage was very poorly maintained. The Grit Building was the place where the sewage first entered the Northeast Plant for processing. According to the expert witnesses who testified, poor maintenance and allowing unsanitary conditions to exist in the Grit Building were major sources of odors emanating from the Northeast Plant. The Grit Building, although presently out of service, remains physically connected to the system and could and would be utilized if there is any serious malfunction or breakdown in the new Preliminary Treatment Building, which building now performs the tasks formerly handled in the Grit Building as well as additional processing work. Also, defense witnesses conceded that there was some influent leakage into the Grit Building that required regular removal, apparently by pumping. Meanwhile, the potential that foul odors will accumulate and be vented out of the building at or near ground level and into the surrounding air remains. There are no ozonators or other equipment in the Grit Building for removing or neutralizing odors before they are discharged into the air at or near ground level through the powered ventilation system.

Ozonators are the great hope of the defendants for solving the major odor problems. A system of ozonators has been installed in the Preliminary Treatment Building and in the buildings that enclose the influent and effluent ends of the primary sedimentation tanks. By adding ozone to the air before it is discharged from the buildings into the atmo-

sphere, it is expected that the ozone will oxidize and thereby neutralize odors caused by decomposition of sewage material and odors caused by volatile chemicals. Because the system has not yet been satisfactorily put into operation, how effective it will be remains uncertain.

The ozonator system in the Preliminary Treatment Building has been tested, but because of complicated technological difficulties in adjusting automatic regulators that will control the amount of ozone to be added to the air, the system has not become operational. Witnesses for the defense testified that it would be put into operation within one week following the end of the trial. Attempts to put the system into operation have been made since September 1985. Some of the long delay may have been caused by disputes with the contractor as to responsibility for operation of the ozonating system.

There is no direct evidence that any of the foul odors coming from the Northeast Plant originate within the Preliminary Treatment Building or the buildings over the ends of the primary sedimentation tanks, both of which areas are designed for ozonators. However, the potential for odors coming from these buildings so long as the ozonators are not operating is clear. Ozonators were designed specifically to address the odor potential. Odors are continuing to come from the Northeast Plant. It is reasonable to conclude that lack of operational ozonators is a factor in the continuing discharge of malodors by the Northeast Plant.

Deputy Water Commissioner Thomas Walton, who has been in charge of the operations at the Northeast Plant since 1980, presented extensive testimony that exposed several causes for malodors escaping from the plant and also pointed out potential future odor problem areas. From his testimony, as well as that of other witnesses, one of the major sources of foul odors was in the Grit Building. The new Preliminary Treatment Building, that replaces the Grit Building, was "phased in" during the fall of 1984 and the following winter. Although the Grit Building was, as of the time of the trial, completely out of service, Mr. Walton testified that it "could be restored to service, if we were to find that during the continu-

ing start-up and shakedown of the pumps in the Preliminary Treatment Building, we would encounter a problem that would require us to go back to it." It is clear from the testimony that the "start-up and shakedown" of the pumps in the Preliminary Treatment Building has not been completed, even though utilization of the new building's facilities was "phased in" commencing in the fall of 1984. The potential of utilizing the now defunct Grit Building remains a distinct and disturbing possibility. As Mr. Walton testified: "At such times as we were [sic] completely confident in the operation of the PTB [Preliminary Treatment Building], the flow into the old Grit Chambers will be completely blocked off in the junction chamber."

Mr. Walton testified to another potential odor source and problem. Screenings and grit in the Preliminary Treatment Building are currently being trucked off-site to temporary storage at the Southwest Plant. This was because the incinerators in the Preliminary Treatment Building, designed to reduce the grit to inert ash, were not yet, according to Mr. Walton, "started up for full operation." The present hauling system is obviously a potential source for escaping odors.

Until the ozonators are properly functioning, any foul odors created inside the buildings that cannot be dissipated within the limited confines of the buildings will be vented by high volume fans into the ambient air from the rooftops. Foul odors, whether created by decomposition of raw sewage or from chemical spills, will thereby be released. Mr. Walton testified that the ozonator system was "still undergoing start-up, and we are awaiting and working with the contractor and vendor to place it into full operation."

Another serious potential odor problem will occur when the thirty-year old primary sedimentation tanks are "rehabilitated." This work, according to Mr. Walton, cannot be started "until the plant is fully operational, including modification to some of the existing final tanks." Mr. Walton also testified that work on the old final settling tanks that are scheduled to be taken out of service and others that are to be "rehabilitated" will be started as soon as the grant award is made by EPA."

These tasks will obviously cause odors to escape unless conducted in a very careful manner.

Presently, sludge is being de-watered and converted into semi-solid sludge cake on site and then conveyed by truck to the Southwest Plant. Until such time as the barging operation is put into effect, truck removal presents an admitted odor hazard.

Scum from the surface of the primary and final sedimentation tanks was formerly incinerated on site. During the renovations, this process was discontinued. Scum is presently collected by a vactor truck (type of suction machine), and discharged into open air lagoons remaining on the site. The lagoons are treated with lime to avoid or minimize odors. The open lagoons are quite obviously a source of potential foul odors. A new scum incinerator has been constructed and, according to Mr. Walton, is presently being "debugged."

From the testimony of Mr. Walton, whose testimony I find to be credible, as well as all the other evidence and testimony in the case, it is apparent that much work remains to be done before the sources and causes of serious malodors may reasonably be expected to be eliminated. What is disturbing is that although defendants have taken the litigation position that the new renovated plant is now "on stream" and fully operational, in fact, much remains to be done and major equipment that optimistically may eliminate odor problems is not functioning. Despite many attempts over a long period of time, defendants have thus far been unable to have the equipment function properly. Equally disturbing, defendants have not provided any specific timetable when the additional work to be done will be completed.

The Water Department has taken several interim measures in an attempt to control odors arising from the Northeast Plant during the renovation and rehabilitation of the plant. These include assigning a qualified engineer on duty until ten o'clock at night to be in charge of any emergency odor control problem and to make "odor tours" around the perimeter of the plant. Deodorizing equipment was attempted to be used in the old sludge heater building (an admitted

major source of odors escaping into the air) without any appreciable degree of success. Attempts were made to force air through wood chips to modify the odor of the air that was vented from the sludge heater building. A contractor has been available to lime the accumulations of grit stockpiled for truck removal; and to lime the lagoons used to hold the removed scum. Deodorizing masking sprays have been used around the perimeters of the sedimentation tanks. As Mr. Walton testified, because of earlier overloading, the primary sedimentation tanks have been failing "with an alarming frequency causing a difficult odor source from accumulated sludge in the bottom of such tanks." Potassium permanganate has been applied to exposed sludge accumulations to avoid septic conditions from developing and thereby producing objectionable odors. Finally, contractors have been employed to speed up tank cleaning and repairs.

There was substantial testimony that the odor problems at the Northeast Plant are diminished from the time that major reconstruction and renovation was taking place in 1983 and 1984. The records of Air Management Services of violations by the plant establish that up to the time of the trial there were continuing and frequent malodor discharges by the plant. The evidence further establishes that the odor problems have not been solved despite the claimed best efforts of the defendants. Much additional work, repair and renovation remains to be done, and a substantial amount of that to be done presents potential air pollution problems, the extent of which are quite uncertain. The short term future appears very bleak for the neighborhood community.

What, if anything, as a practical matter, can the court do to help alleviate the problem? Wholly aside from the difficult legal issues of this court's authority to issue injunctive relief under the federal Clean Air Act or as relief for a pendent state claim under the Pennsylvania Air Pollution Control Act or for a common-law nuisance, will any enforceable decree bring about a correction of the problem? I have no doubt that the officials of the Water Department responsible for operating the Northeast Plant are sincerely attempting to take reason-

able steps to minimize the discharge of offensive odors into the air. All of the City witnesses who testified on the subject either expressly or by clear implication asserted therein that when all of the contemplated work is completed and the whole system is finally fully tested and operating as intended and expected there should be no further air pollution problems. However, the law does not and should not provide any allowance for air pollution violations. At common law, neither individuals nor municipalities have the right to maintain for any period of time activities that constitute a public nuisance, irrespective of lack of fault or due care. Because the Northeast Plant can be operated without creating a public nuisance, it must be so operated.

To issue a simple injunction prohibiting the City from doing that which the law clearly prohibits may, on first impression, appear to be of little value and redundant. Because of the power of a court to enforce a valid injunction through contempt proceedings, there are, however, practical benefits to such a general injunction. Repeated notices of violations by the Air Management Services have been of little, if any, practical help in preventing further violations. At a minimum therefore, this court, if it has jurisdiction in this case to do so, should enjoin continuing violations even though ultimate enforcement may require contempt proceedings.

By Memorandum Opinion dated April 23, 1985, I ruled that I had no right to review or invalidate EPA's approval of the Pennsylvania SIP. Pursuant to 42 U.S.C. § 7607(b), a petition for review must be filed with the court of appeals. Defendants in this case filed such a petition after this case was instituted. The court of appeals dismissed the petition as untimely. Therefore, at the time this action was filed, the Pennsylvania SIP incorporated the odor pollution provisions of the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code. This action filed pursuant to the "Citizen's Complaint" provision of the Clean Air Act, 42 U.S.C. § 7604, afforded jurisdiction. By revision of its approval, EPA eliminated from the Pennsylvania SIP the odor pollution provisions of the Pennsylvania Air Pollution Control Act and the

Philadelphia Air Management Code. If this revision was validly adopted, it became effective June 19, 1986, subsequent to the date of the trial. A petition for review as to the validity of the revision has been filed by plaintiffs with the court of appeals. No stay as to the effectiveness of the revision has been entered.

This court had valid federal jurisdiction when this action was filed. Federal jurisdiction continued at least through the date of completion of the trial. The revision of the Pennsylvania SIP, even if held by the court of appeals to be valid would not thereby cause the district court to lose all jurisdiction, although it might, as of this date, preclude the entry of any injunctive or other relief under the Clean Air Act.

On a motion to dismiss, filed the morning set for the commencement of the trial, I ruled from the bench that the district court had jurisdiction to hear the federal claim and that there were valid pendent state law claims that would also be tried at the same time. Even if, by reason of the now adopted revision of EPA's approval of the Pennsylvania SIP, the district court may no longer have the power to issue an injunction under the "Citizen's Complaint" provisions of the Clean Air Act, 42 U.S.C. § 6504, it would still retain jurisdiction to decide pendent state claims. *Rosado v. Wyman*, 397 U.S. 397, 404-405 (1970); *Nationwide Mutual Insurance Company v. T & D Cottage Auto Parts*, 705 F.2d 685, 687 (3d Cir. 1983).

The complaint did not expressly seek relief on the basis of any pendent state claim. It is clear, however, that prior to trial, plaintiffs asserted their intention to rely on pendent state causes of action under the Pennsylvania Air Pollution Control Act. This was brought about because of the proposed revision of the EPA approval of the Pennsylvania SIP. Violations of both the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code were expressly alleged in the complaint. Reliance at trial on the pendent state claims in no way surprised or caused prejudice to the defendants. No evidence was introduced that was not subject to prior discovery. As part of plaintiffs' proof of violation of the Clean Air Act,

plaintiffs were required under the pleadings to prove violations of either or both the Pennsylvania Air Pollution Control Act or the Philadelphia Air Management Code. This same evidence was likewise relevant and essential to establishing a common-law nuisance. Thus, plaintiffs' reliance on the state pendent claims caused neither surprise nor prejudice to defendants.

To bring an action or suit in equity under the Pennsylvania Air Pollution Control Act, the statute expressly requires thirty days prior notice be served upon the Attorney General. No such notice was ever provided to the Attorney General although prior notice was provided to many state and city officials. (See Finding of Fact 13). Those notices were obviously given in order to comply with notice provisions of the Clean Air Act, 42 U.S.C. § 7604(b), which require notice to the state, but not necessarily to the State Attorney General. Although plaintiffs argue that the Attorney General obviously had notice, I cannot accept that as being in compliance with the express statutory requirement that such notice be *served* on the Attorney General. Nor can I accept the argument, in the absence of some controlling state court decision, that the Act is merely directory and not mandatory. In my view, the absence of such notice precludes the plaintiffs from proceeding, as a pendent cause of action, under the Pennsylvania Air Pollution Control Act for an injunction under 35 P.S. § 4010(f).

This, however, does not complete the inquiry. The Pennsylvania Air Pollution Control Act expressly provides that "this act is to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth." 35 P.S. § 4012(g). Also, 35 P.S. § 4012.1a provides in part:

> It is hereby declared to be the purpose of this act to provide additional and cumulative remedies to abate the pollution of the air of this Commonwealth, and nothing contained in this act shall in any way abridge or alter rights of action or remedies now or hereafter existing in equity, or under the common law or statutory law, crimi-

> nal or civil, nor shall any provision of this act . . . be construed as estopping the Commonwealth, persons or municipalities, in the exercise of their rights under the common law or decisional law or in equity, from proceeding in courts of law or equity to suppress nuisances, or to abate any pollution now or hereafter existing, or enforce common law or statutory rights. No courts of this Commonwealth having jurisdiction to abate public or private nuisances shall be deprived of such jurisdiction to abate any private or public nuisance instituted by any person for the reason that such nuisance constitutes air pollution.

35 P.S. § 4013 provides:

> A violation of any order or of any provision of any rule or regulation promulgated pursuant to a local air pollution code or to a State air pollution act, which limits or controls the emission of any air contaminant shall constitute a public nuisance and shall be abatable in the manner provided by law.

A statute could hardly be more specific that common law remedies remain. If a court finds a violation of either or both the Air Pollution Control Act or the Philadelphia Air Management Code, on the suit of residents, the court may enjoin such violations as public nuisances, notwithstanding failure to give prior notice to the State Attorney General.

Consequently, irrespective of whether plaintiffs may obtain injunctive or other relief under the federal Clean Air Act because of the revision of EPA's approval of the Pennsylvania SIP, and irrespective of whether plaintiffs may maintain a state statutory claim under the Pennsylvania Air Pollution Control Act for injunctive or other relief such as civil monetary penalties because of failure to notify the Attorney General of Pennsylvania, plaintiffs may nonetheless proceed in this action against defendants in equity to enjoin and abate as a common law nuisance, the air pollution being created by the defendants at the Northeast Plant. This court has and will

assert pendent jurisdiction as to the common-law claim of maintaining a public nuisance.

The intervenor-defendants operate industrial plants that discharge certain industrial wastes into the sewers leading to the Northeast Plant. They intervened to prevent any injunctive relief that would adversely affect their continued use of the public sewers to dispose of certain industrial wastes. There is ample evidence that chemical spills have from time to time occurred, which result in strong and obnoxious chemical odors being emitted from the Northeast Plant. There is, however, no evidence that such odors are caused by the regulated industrial waste discharges from either of the intervenor-defendants, with the exception of the cumene problem at Allied Corporation's plant. That problem was satisfactorily corrected long before the trial. There is no evidence upon which to conclude that any of the present and continuing odor problems are caused by either intervenor-defendant.

The sources of any chemical odors in the ambient air in the vicinity of the Northeast Plant are, at best, difficult to trace. A strong sewer or sewer gas odor in the vicinity may logically be found to come from the Northeast Plant, especially when the odor is more noticeable downwind from the plant. Chemical odors, however, are more difficult to trace to the Northeast Plant. In the immediate vicinity there are several chemical plants, including the plants of both intervenor-defendants. This case involves claims of malodors arising from the Northeast Plant, not odors coming from other industrial plants. Although no industrial plant, including either intervenor-defendant, has a right to pollute the air with foul chemical odors, so far as this action is concerned, only if such chemical odors come from and through the sewer system at the Northeast Plant would injunctive or other relief as to chemical odors be appropriate.

Plaintiffs failed to establish by a preponderance of the evidence that either of the intervenor-defendants presently causes or is likely to cause in any way any of the malodors, including chemical malodors, coming from the Northeast Plant. Injunctive relief against either of the intervenor-defen-

dants would not be justified on the basis of the evidence presented.

Plaintiffs seek various types of injunctive relief. General injunctive relief against committing a public nuisance by the Northeast Plant emitting malodors into the ambient air seems clearly appropriate. A provision that defendants be enjoined from violating the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code, to the extent that such violations constitute a public nuisance is also appropriate. Even though this case is being decided and relief granted on the basis of a common-law public nuisance, the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code, in substance merely specify and codify certain of the common law as to what constitutes a public nuisance. In addition, it is the obligation of the Northeast Plant to operate in conformity with the odor provisions of both the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code. Clearly the plant has not operated within the requirements of either the statute or the code.

Plaintiffs seek the court to specify on a sliding scale the amount of monetary penalty that shall be assessed in the event of future violations, to be paid to the Clean Air Fund of the Commonwealth of Pennsylvania. Although the Pennsylvania Air Pollution Control Act provides for specific monetary penalties payable to the Clean Air Fund, 35 P.S. 4009.1-4009.2-4010, because no notice was served on the Attorney General as provided by the Act, the procedures and remedies therein specified are not applicable. I find it unnecessary at this stage of the proceeding to specify what penalties, or other sanctions, may or will be imposed in the event of any violation of the injunction. Those matters may more properly be determined when and if there is a finding of contempt for violation of any injunction.

The proposed relief requests that an order implementing certain procedures and imposing reporting obligations when complaints of odor pollution are received be put into effect. Defendants assert that most of these procedures are already required or are otherwise adequately covered by other proce-

dures, making such requirements by court order unnecessary and redundant. Certain requirements will be specified to be sure that the public and the court are adequately advised and notified of future odor problems at Northeast Plant and of corrective measures taken, and as to progress for finally putting the renovated plant in complete and proper functioning order.

Plaintiffs ask the court to award attorney fees and costs, including expert witness fees. Under state law, attorney's fees and costs by successful plaintiffs are not recoverable, either at common law or under the Pennsylvania Air Pollution Control Act. Under the federal Clean Air Act, 42 U.S.C. § 7604(d), the court, in issuing any final order, "may award costs of litigation (including reasonable attorney and expert witness fees) to any party, whenever the court determines such award is appropriate."

Plaintiffs chose to file this action in federal court, despite serious questions as to federal jurisdiction because of the questionable validity of EPA's approval of the odor provisions of the Pennsylvania SIP. Plaintiffs' counsel frankly stated that the primary reason for seeking relief under the federal Clean Air Act was because of the provision for possible attorney's fees and expert witness costs. An attorney representing a client is fully justified, and arguably obligated, where there is a choice of forum, to select the forum where the matter may be litigated at the least cost to the client, all other considerations being equal. This action was filed on behalf of an entire community. Plaintiffs were represented by the Public Interest Law Center of Philadelphia, so-called "Pilcop." It is well known that one of Pilcop's main sources of revenue is derived from successful litigation in cases where statutory fees are provided.

As noted previously, I have ruled that this court acquired federal jurisdiction under the Clean Air Act, 42 U.S.C. § 7604, and that it would accept pendent jurisdiction as to the state statutory and common-law claims. There is grave doubt that any viable federal claim existed subsequent to June 19, 1986, the effective date of EPA's revision of its approval of the

Pennsylvania SIP, which eliminated the odor provisions from federal approval. This case has been decided and the relief to be granted will be founded solely on the basis of the pendent state common-law nuisance claim.

The question presented is whether it would be "appropriate" to award attorney's fees and costs pursuant to 42 U.S.C. § 7604(d), even assuming the right to award fees and costs in this case. I have ruled that the federal claim was and remains sufficient to provide federal court jurisdiction and to permit a final decision on the pendent state claims. However, because relief will be granted solely on the state common-law public nuisance claim, under the facts of this case, I do not find it appropriate to award any attorney's fees or costs. I so conclude notwithstanding the consideration that it was entirely proper to file this action in this court and seek attorney's fees and costs. In my view, only if some relief is awarded under the federal statute, would the award of attorney's fees and costs be appropriate. At the present time, this court probably could not validly provide any injunctive or other relief under the federal Clean Air Act. At least, no such relief will be granted. Consequently, attorney's fees and costs under that Act are not appropriate and will not be awarded.

To the extent that the "Discussion" portion of this opinion contains findings of fact and/or conclusions of law not set forth separately under the respective findings of fact or conclusions of law sections of this opinion, the same shall be deemed as additional findings of fact and/or conclusions of law.

Conclusions of Law

1. This court has subject-matter jurisdiction and has jurisdiction over the parties to this action.

2. Venue in this district is proper.

3. The Northeast Water Pollution Control Plant of the City of Philadelphia continues, as it has in the past, to discharge and emit into the ambient air, malodors that cause substantial harm, injury, annoyance and discomfort to resi-

dents and persons in the vicinity of the Northeast Water Pollution Control Plant.

4. The malodors that have been and continue to be emitted from the Northeast Water Pollution Control Plant are unnecessary and unreasonable.

5. The malodors that have been and continue to be emitted from the Northeast Water Pollution Control Plant constitute a public nuisance.

6. The City of Philadelphia, through its Water Department, owns, operates, controls and maintains the Northeast Water Pollution Control Plant.

7. The City of Philadelphia continues, as it has in the past, to maintain a public nuisance caused by the malodors being discharged into the ambient air and being permitted to escape from the lands of the Northeast Water Pollution Control Plant into adjoining, separate and other lands and property.

8. Plaintiffs are entitled to an injunction against the City of Philadelphia to abate and preclude the continuing public nuisance.

9. Plaintiffs have not proved by a preponderance of the evidence that either of the intervenor-defendants, Rohm and Haas Company or Allied Corporation, are the cause of any continuing malodors being emitted from the Northeast Water Pollution Control Plant.

10. An award of attorney's fees and costs to plaintiffs, pursuant to 42 U.S.C. § 4706(f), is not appropriate, and fees and costs will not be awarded to plaintiffs.

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCERNED CITIZENS OF BRIDESBURG, et al.	:	CIVIL ACTION
v.	:	
CITY OF PHILADELPHIA, et al.	:	NO. 85-14

ORDER

Based upon the foregoing opinion containing findings of fact, discussion and conclusions of law, and after a full trial on the merits, it is

Ordered, Adjudged and Decreed as follows:

1. The City of Philadelphia is enjoined from maintaining and operating the Northeast Water Pollution Control Plant of the City of Philadelphia in violation of the odor emission provisions of the Pennsylvania Air Pollution Control Act, 25 Pa. Code § 123.31, and of the Philadelphia Air Management Code §§ 3-102(3), (5), (25) and § 3-201(a)(3), and the respective regulations of the Pennsylvania Air Pollution Control Act and the Philadelphia Air Management Code.

2. The City of Philadelphia is enjoined from maintaining and operating the Northeast Water Pollution Control Plant in such a way or manner as to cause the emission into the ambient air of any malodor of such intensity, quantity and concentration as unreasonably to cause injury, harm, annoyance, or discomfort to persons of normal sensibilities who are not on the land of the Northeast Water Pollution Control Plant.

3. Whenever the Northeast Water Pollution Control Plant is notified by Air Management Services of a violation of the Philadelphia Air Management Code or the Pennsylvania Air Pollution Control Act, the City of Philadelphia, through its Water Department shall promptly make a comprehensive investigation of the source and cause of the violation and take all reasonable actions and measures to eliminate the violation

and any potential repetition. Within seventy-two (72) hours of receipt of notice of a violation from Air Management Services, a detailed written report showing full compliance with this portion of the order shall be signed by the supervisor in charge of the Northeast Water Pollution Control Plant and by the Commissioner or Deputy Commissioner of the Water Department of the City of Philadelphia, and filed in this action with the court, with a copy to counsel for plaintiffs.

4. Whenever an individual makes a complaint of an odor emission violation by the Northeast Water Pollution Plant to Air Management Services, and Air Management Services, whether upon investigation or not, fails to find and notify the Northeast Water Pollution Control Plant of a violation, upon the signature of three or more adult persons attesting to the time and place of the claimed violation and served upon whomever may be for the time being the supervisor in charge of the Northeast Water Pollution Control Plant and/or the Commissioner or Deputy Commissioner of the Water Department of the City of Philadelphia, an investigation and report shall be made and filed as provided in paragraph 3 of this order.

5. In the event that three (3) or more reports as required by paragraph 3 and/or 4 of this order are required to be filed with the court within any period of thirty (30) days, upon application of any party or upon the court's initiative, sua sponte, a prompt hearing for contempt may be held. Nothing herein shall preclude plaintiffs or any other party having a proper interest from seeking a citation for contempt in the event of any violation of any portion of this order.

6. The Water Department of the City of Philadelphia shall, on or before the tenth (10th) day of each month, file with the court a detailed written report, signed by the Commissioner or Deputy Commissioner of the Water Department, setting forth all repairs, renovations and capital improvements to the Northeast Water Pollution Control Plant that have occurred during the reporting period together with a timetable for all planned future repairs, renovations and capital improvements that have caused or may reasonably be

expected to cause any malodor or air pollution. Such report shall also set forth any malfunction, breakdown or testing of equipment occurring during the reporting period that has caused or may have caused any malodor or any air pollution and any and all actions taken to minimize such malodor or air pollution problem. A copy of such reports shall be provided to counsel for plaintiffs.

7. In the event of any chemical discharge or spill entering the Northeast Water Pollution Control Plant that creates a detectable malodor in the ambient air outside of any building at the Northeast Water Pollution Control Plant or causes or requires any building to be evacuated by employees, a similar investigation and report as required by paragraphs 3 and 4 of this order shall be made and filed. Investigation of any chemical discharge or spill causing a detectable malodor or an evacuation of any building shall seek to determine promptly the source and cause thereof and the City of Philadelphia shall take all reasonable measures to prevent reoccurrence from the same or any other source. The results of such investigation and the action taken shall be set forth in the report required to be filed by this order.

8. Any party may file a motion at any time for any alteration, modification, addition or change in this order, provided the parties first seek in good faith by conference with each other to agree and stipulate to the same.

BY THE COURT:

/s/
Donald W. VanArtsdalen, S.J.

July 25, 1986

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCERNED CITIZENS OF BRIDESBURG, et al.	:	CIVIL ACTION
v.	:	
PHILADELPHIA WATER DEPARTMENT, et al.	:	NO. 85-14

ORDER

WHEREAS, plaintiffs' complaint seeks declaratory, injunctive and other relief for defendants' alleged violations of, inter alia, the Clean Air Act, 42 U.S.C. §§ 7401-7642; and

WHEREAS, defendants have filed a motion to dismiss plaintiffs' complaint contending, inter alia, that odor emissions are not included within the ambit of the Federal Clean Air Act; and

WHEREAS, plaintiffs' contend in response that certain state regulations controlling malodorous emissions were approved by the Environmental Protection Agency (EPA) as part of Pennsylvania's State Implementation Plan (SIP), thus making control of malodorous emissions a part of the Clean Air Act by virtue of its incorporation in the SIP; and

WHEREAS, the EPA is not a party to this suit; and

WHEREAS, "the acceptance of amicus [curiae] briefs is within the sound discretion of the [district] court," *Strasser v. Doorley*, 432 F.2d 567 (1st Cir. 1970); and

WHEREAS, amicus curiae is technically "a friend of the court," not an advocate, that arises via an ex parte order of the court and advises the court in order that justice may be attained, *Allen v. School Board of Prince Edward County*, 28 F.R.D. 358, 362 n.2 (E.D.Va. 1961); and

WHEREAS, there is authority in this district for submission of an amicus brief on invitation from the court when the participation of a government agency "would probably be very helpful to the resolution of the issues before [the court],"

Degregorio v. O'Bannon, 86 F.R.D. 109, 120 (E.D.Pa. 1980) (Pollak, J.); and

WHEREAS, because plaintiffs contend that the state regulations submitted to the EPA have become part of Pennsylvania's SIP under the Clean Air Act, it would be helpful to me to hear the EPA's position on the matter; and

WHEREAS, the EPA may, if it wishes, submit an amicus brief on the issues in this case that affect it. Primarily, the EPA's views regarding the agency's approval of state odor emission regulations and enforcement of such regulations under the Clean Air Act are invited; it is therefore

Ordered that request is made and leave is granted to the Environmental Protection Agency of the United States, if it so desires, to file a brief within thirty (30) days from this date, as amicus curiae on the pending motion of the defendant to dismiss the complaint.

BY THE COURT:

/s/

Donald W. VanArtsdalen, S.J.

February 19, 1985

IN THE UNITED STATES DISTRICT COURT
FOR THE EASTERN DISTRICT OF PENNSYLVANIA

CONCERNED CITIZENS OF BRIDESBURG, et al., Plaintiffs,	)	
v.	)	Civil Action No. 85-14
PHILADELPHIA WATER DEPARTMENT, et al., Defendants.	)	

BRIEF OF THE UNITED STATES ENVIRONMENTAL PROTECTION AGENCY AS AMICUS CURIAE

This Court's Order of February 19, 1985 requested and granted leave to the United States Environmental Protection Agency ("EPA") to file a brief as amicus curiae on defendants' pending motion to dismiss the complaint. Specifically, the Court solicited EPA's views regarding EPA's approval of state odor emission regulations and enforcement of such regulations under the Clean Air Act, 42 U.S.C. §§ 7401-7626 (1982).

In response to the Court's Order of February 19, 1985, EPA now submits this brief, advising the Court that (1) EPA approved the state odor emission regulations at issue here in 1973, thereby making them part of the federally enforceable State Implementation Plan for Pennsylvania, (2) this Court lacks jurisdiction to review EPA's 1973 action, (3) EPA now believes that these regulations should not be part of the State Implementation Plan for Pennsylvania because they bear no relation to attainment or maintenance of the National Ambient Air Quality Standards, and (4) EPA intends to propose to delete the state odor emission regulations from the State Implementation Plan for Pennsylvania.

I. FACTUAL BACKGROUND

On January 27, 1972, the Pennsylvania Department of Environmental Resources ("DER"), on behalf of the Commonwealth of Pennsylvania, submitted its State Implementation Plan ("SIP") to EPA for review and approval. Under section 110(a)(1) of the Clean Air Act, 42 U.S.C. § 7410 (1982), each state must submit a SIP that provides for attainment and maintenance of the National Ambient Air Quality Standards ("NAAQS"). DER submitted a voluminous SIP that included both the Commonwealth's odor emission regulation, 25 Pa. Code § 123.31, and the City of Philadelphia's odor emission regulations (hereinafter collectively referred to as the "state odor emission regulations").

EPA later approved the SIP submitted by DER. *See* 38 Fed. Reg. 32,893 (Nov. 28, 1973) (codified at 40 C.F.R. § 52.2023). In doing so, EPA listed several provisions of the SIP that it was not approving. These specific exceptions did not include the state odor emission regulations. Thus, EPA's action, on the face of it, approved the state odor emission regulations as part of the Pennsylvania SIP.

On September 20, 1978, DER submitted to EPA a revision to the Pennsylvania SIP that, *inter alia*, modified the state odor emission regulations by exempting agricultural sources from the control requirements. *See* 40 C.F.R. § 52.2020(c)(21) (1984). EPA later approved this SIP revision. *See* 45 Fed. Reg. 56,060 (Aug. 22, 1980).

II. DISCUSSION

EPA followed notice-and-comment rulemaking procedures in its approval of the 1972 Pennsylvania SIP. As part of this procedure, EPA issued a public statement implicitly recognizing the state odor emission regulations as part of the Pennsylvania SIP. *See* 38 Fed. Reg. 32,893 (1973); 40 C.F.R. § 52,2023 (1984). In that sense, EPA approved the state odor emission regulations as part of the Pennsylvania SIP.

Under section 307(b)(1) of the Clean Air Act, any interested person may seek judicial review of final action taken by EPA by filing a petition for review in the appropriate court of

appeals within sixty days after notice of such final action appears in the *Federal Register*. 42 U.S.C. § 7607(b)(1) (1982); *see, e.g., Harrison* v. *PPG Industries, Inc.*, 446 U.S. 578 (1980); *Action for Rational Transit* v. *West Side Highway*, 699 F.2d 614, 616 (2d Cir. 1983) (per curiam).

Significantly, section 307(b)(2) expressly states that any EPA action that could have been reviewed in this manner in the court of appeals "shall not be subject to judicial review in civil or criminal proceedings for enforcement." 42 U.S.C. § 7607(b) (1982). This limitation has been characterized as jurisdictional and has been strictly construed. *See Adamo Wrecking Co.* v. *United States*, 434 U.S. 275, 282, 285 (majority opinion), 291, 292 (Stewart, J., dissenting) (1978); *Friends of the Earth* v. *Carey*, 552 F.2d 25, 34-35 (2d Cir. 1977); *Getty Oil Co.* v. *Ruckelshaus*, 467 F.2d 349, 357-58 n.14 (3d Cir. 1972), *cert. denied*, 409 U.S. 1125 (1973).

Because EPA's 1973 approval of the Pennsylvania SIP could have been reviewed in the court of appeals at the time EPA took that action, it is not subject to judicial review in any civil or criminal proceeding for enforcement. Thus, this Court lacks jurisdiction to review EPA's 1973 approval of the Pennsylvania SIP, including its approval of the state odor emission regulations submitted as part of the Pennsylvania SIP.

EPA recognizes the problem raised by its approval of the state odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which requires measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to approve a state rule as part of the SIP, the rule must significantly control emissions that contribute, directly or indirectly, to concentrations of pollutants for which an NAAQS has been established. Yet the City of Philadelphia points out here, and EPA agrees, that the state odor emission regulations bear no relationship to the attainment or maintenance of any NAAQS.

Because the state odor emission regulations are presently part of the Pennsylvania SIP, by reason of EPA's 1973 approval, EPA now intends to propose deletion of these regula-

tions and to solicit public comment on whether they contribute in any way to the attainment or maintenance of any NAAQS. Absent some showing that the odor emission regulations contribute significantly to the attainment or maintenance of an NAAQS, EPA intends to delete them from the Pennsylvania SIP after reviewing the public comments. EPA hopes to publish this proposal in the *Federal Register* in the near future.[1]

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1. We also note that the Commonwealth court revise its SIP to delete the odor emission regulations without awaiting EPA action. EPA would be required to approve such a revision under section 110(a)(3)(A) of the Clean Air Act so long as it met the statutory criteria applicable to SIP submissions.

III. CONCLUSION

For the reasons stated above, EPA submits that (1) the state odor emission regulations became part of the Pennsylvania SIP in 1973, when EPA approved them, and (2) EPA's 1973 approval is not subject to judicial review at the present time. However, EPA now believes that these regulations should not be part of the Pennsylvania SIP, because they bear no relation to attainment or maintenance of the NAAQS, and EPA intends to propose to delete the state odor emission regulations from the Pennsylvania SIP.

Respectfully submitted,

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DATE: MARCH 20, 1985

CERTIFICATE OF SERVICE

This is to certify that on March 20, 1985, I caused copies of the foregoing Brief of United States Environmental Protection Agency as Amicus Curiae to be served upon the following by placing them in a U.S. Postal Service depository, first-class postage prepaid:

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/s/
Michael W. Steinberg

U.S. CONST. V AMEND.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of War or public danger; nor shall any person be subject for the same offence to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

SECTION 110(a) OF THE CLEAN AIR ACT

§ 7410. State implementation plans for national primary and secondary ambient air quality standards

(a) Adoption of plan by State; submission to Administrator; content of plan; revision; new sources; indirect source review program; supplemental or intermittent control systems

(1) Each State shall, after reasonable notice and public hearings, adopt and submit to the Administrator, within nine months after the promulgation of a national primary ambient air quality standard (or any revision thereof) under section 7409 of this title for any air pollutant, a plan which provides for implementation, maintenance, and enforcement of such primary standard in each air quality control region (or portion thereof) within such State. In addition, such State shall adopt and submit to the Administrator (either as a part of a plan submitted under the preceding sentence or separately) within nine months after the promulgation of a national ambient air quality secondary standard (or revision thereof), a plan which provides for implementation, maintenance, and enforcement of such secondary standard in each air quality control region (or portion thereof) within such State. Unless a separate public hearing is provided, each State shall consider its plan implementing such secondary standard at the hearing required by the first sentence of this paragraph.

(2) The Administrator shall, within four months after the date required for submission of a plan under paragraph (1), approve or disapprove such plan or each portion thereof. The Administrator shall approve such plan, or any portion thereof, if he determines that it was adopted after reasonable notice and hearing and that—

(A) except as may be provided in subparagraph (I)(i) in the case of a plan implementing a national primary ambient air quality standard, it provides for the attainment of such primary standard as expeditiously as practicable but (subject to subsection (e) of this section) in no

case later than three years from the date of approval of such plan (or any revision thereof to take account of a revised primary standard); and (ii) in the case of a plan implementing a national secondary ambient air quality standard, it specifies a reasonable time at which such secondary standard will be attained;

(B) it includes emission limitations, schedules, and timetables for compliance with such limitations, and such other measures as may be necessary to insure attainment and maintenance of such primary or secondary standard, including, but not limited to, transportation controls, air quality maintenance plans, and preconstruction review of direct sources of air pollution as provided in subparagraph (D);

(C) it includes provision for establishment and operation of appropriate devices, methods, systems, and procedures necessary to (i) monitor, compile, and analyze data on ambient air quality and, (ii) upon request, make such data available to the Administrator;

(D) it includes a program to provide for the enforcement of emission limitations and regulation of the modification, construction, and operation of any stationary source, including a permit program as required in parts C and D of this subchapter and a permit or equivalent program for any major emitting facility, within such region as necessary to assure (i) that national ambient air quality standards are achieved and maintained, and (ii) a procedure, meeting the requirements of paragraph (4), for review (prior to construction or modification) of the location of new sources to which a standard of performance will apply;

(E) it contains adequate provisions (i) prohibiting any stationary source within the State from emitting any air pollutant in amounts which will (I) prevent attainment or maintenance by any other State of any such national primary or secondary ambient air quality standard, or (II) interfere with measures required to be in-

cluded in the applicable implementation plan for any other State under part C of this subchapter to prevent significant deterioration of air quality or to protect visibility, and (ii) insuring compliance with the requirements of section 7426 of this title, relating to interstate pollution abatement;

(F) it provides (i) necessary assurances that the State will have adequate personnel, funding, and authority to carry out such implementation plan, (ii) requirements for installation of equipment by owners or operators of stationary sources to monitor emissions from such sources, (iii) for periodic reports on the nature and amounts of such emissions; (iv) that such reports shall be correlated by the State agency with any emission limitations or standards established pursuant to this chapter, which reports shall be available at reasonable times for public inspection; (v) for authority comparable to that in section 7603 of this title, and adequate contingency plans to implement such authority; and (vi) requirements that the State comply with the requirements respecting State boards under section 7428 of this title;

(G) it provides, to the extent necessary and practicable, for periodic inspection and testing of motor vehicles to enforce compliance with applicable emission standards;

(H) it provides for revision, after public hearings, of such plan (i) from time to time as may be necessary to take account of revisions of such national primary or secondary ambient air quality standard or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) except as provided in paragraph (3)(C), whenever the Administrator finds on the basis of information available to him that the plan is substantially inadequate to achieve the national ambient air quality primary or secondary standard which it implements or to otherwise comply with any

additional requirements established under the Clean Air Act Amendments of 1977;

(I) it provides that after June 30, 1979, no major stationary source shall be constructed or modified in any nonattainment area (as defined in section 7501(2) of this title) to which such plan applies, if the emissions from such facility will cause or contribute to concentrations of any pollutant for which a national ambient air quality standard is exceeded in such area, unless, as of the time of application for a permit for such construction or modification, such plan meets the requirements of part D of this subchapter (relating to nonattainment areas);

(J) it meets the requirements of section 7421 of this title (relating to consultation), section 7427 of this title (relating to public notification), part C of this subchapter (relating to prevention of significant deterioration of air quality and visibility protection); and

(K) it requires the owner or operator of each major stationary source to pay to the permitting authority as a condition of any permit required under this chapter a fee sufficient to cover—. . . .

SECTION 304 OF THE CLEAN AIR ACT

§ 7604. Citizen suits

(a) Authority to bring civil action; jurisdiction

Except as provided in subsection (b) of this section, any person may commence a civil action on his own behalf—

(1) against any person (including (i) the United States, and (ii) any other governmental instrumentality or agency to the extent permitted by the Eleventh Amendment to the Constitution) who is alleged to be in violation of (A) an emission standard or limitation under this chapter or (B) an order issued by the Administrator or a State with respect to such a standard or limitation,

(2) against the Administrator where there is alleged a failure of the Administrator to perform any act or duty under this chapter which is not discretionary with the Administrator, or

(3) against any person who proposes to construct or constructs any new or modified major emitting facility without a permit required under part C of subchapter I of this chapter (relating to significant deterioration of air quality) or part D of subchapter I of this chapter (relating to nonattainment) or who is alleged to be in violation of any condition of such permit.

The district courts shall have jurisdiction, without regard to the amount in controversy or the citizenship of the parties, to enforce such an emission standard or limitation, or such an order, or to order the Administrator to perform such act or duty, as the case may be.

PROPOSED RULE

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

[EPA Docket No. AM045PA; A-3–FRL-2880–7]

Pennsylvania State Implementation Plan; Proposed Approval of Revisions.

AGENCY: U.S. Environmental Protection Agency.

ACTION: Proposed rule.

Summary: EPA proposes to withdraw its former approval of State and local odor emission control regulations as part of the Pennsylvania State Implementation Plan (SIP). EPA believes that these regulations should not be included in the Pennsylvania SIP because they bear no relation to attainment and maintenance of the National Ambient Air Quality Standards (NAAQS).

The public is invited to submit comments on the matters discussed here and EPA's proposed action.

Date: Comments must be submitted on or before September 11, 1985.

Addresses: Copies of the relevant regulations and accompanying support material are available for public inspection during normal business hours at the following location: U.S. Environmental Protection Agency, Region III, Air Management Division, 841 Chestnut Building, Eighth Floor, Philadelphia, PA 19107; Attn: Donna Abrams (3AM11).

For Further Information Contact: Donna Abrams (3AM11) at the EPA. Region III address above or call (215) 597-9134.

All comments on the proposed action submitted within 30 days of publication of this notice will be considered and should be directed to Mr. Glenn Hanson, Chief, PA/WV Section at the EPA, Region III address above, EPA Docket No. AM045PA.

Supplementary Information: Under section 110(a)(1) of the Clean Air Act, each state must submit to EPA an SIP that provides for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). On January 27, 1972, the Pennsylvania Department of Environmental Resources (DER), on behalf of the Commonwealth of Pennsylvania, submitted its SIP to EPA for review and approval. DER's SIP submittal included the Commonwealth's odor emission regulation and the City of Philadelphia's odor emission regulation (hereinafter collectively referred to as the "State odor emission regulations").

EPA initially approved portions of the Pennsylvania SIP, via a national notice, on May 31, 1972 (See 37 FR 10889). In this notice, EPA approved all portions of the State plans unless they were specifically disapproved. These exceptions did not include the State odor emission regulations. Therefore they were approved by EPA as part of the Pennsylvania SIP.

EPA reaffirmed its approval of the Pennsylvania SIP, including the State odor emission regulations, on November 23, 1973. *See* 38 FR 32893. In this notice, EPA approved Pennsylvania's plan for attainment and maintenance of the national standards except for specific portions which were listed in the notice. These specific exceptions did not include the State odor emission regulations.

On September 20, 1978, DER submitted to EPA a revision to the Pennsylvania SIP that, among other things, modified the state odor emission regulations by exempting agricultural sources from the control requirements. *See* 40 CFR 52.2020(c)(21) (1984). EPA later approved this SIP revision. *See* 45 FR 56060 (August 22, 1980).

EPA recognizes the problem raised by its approval of the State odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which require measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to properly approve a State rule as part of the SIP, the rule must have a significant relationship to attainment and maintenance of an NAAQS.

EPA believes that the State odor emission regulations bear no significant relationship to the attainment and maintenance of any NAAQS. In general, EPA believes that there is no direct or indirect relationship between the State odor emission regulations cited below and any criteria pollutant.

The regulations, pertaining to odor emission control, which would be affected are:

(a) 25 PA Code Section 123.31—Odor Emissions;

(b) Regulation I (Philadelphia Air Management Code), Section I(A)(3)—Air Contaminant;

(c) Regulation I (Phila. AMC), Section I(A)(4)—Air Pollution;

(d) Regulation I (Phila. AMC), Section I(A)(5)—Air Pollution Nuisance;

(e) Regulation I (Phila. AMC), Section I(A)(25)—Odor;

(f) Regulation I (Phila. AMC), Section X—Compliance with regulations of Pennsylvania Air Quality Board;

(g) Regulation XI (Phila. AMC), Section III(C)—Odor Emissions

Because the State odor emission regulations are presently part of the Federally approved Pennsylvania SIP, EPA is now proposing deletion of those portions of these regulations pertaining to odor emission controls and is soliciting public comments on whether the odor emission control regulations contribute in any way to the attainment or maintenance of any NAAQS. Absent some showing that the odor emission regulations contribute significantly to the attainment or maintenance of an NAAQS, EPA intends to delete them from the Pennsylvania SIP.

Interested parties are invited to submit comments on this action. EPA will consider comments received within 30 days of publication of this notice.

Under 5 U.S.C. section 605(b), I certify that this SIP revision will not have a significant economic impact on a substantial number of small entities. (See 46 FR 8709.) The action, if promulgated, would if anything, provide relief from regulatory burdens.

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 52

Intergovernmental relations, Air pollution control. Ozone, Sulfur oxides, Nitrogen dioxides, Lead, Particulate matter, Carbon monoxide, Hydrocarbon.

Authority: 42 U.S.C. 7401-7642.
Dated: July 9, 1985.

Stanley L. Laskowski,
Acting Regional Administrator.

(FR Doc. 85–19106 Filed 8–9–85; 8:45 am)

FINAL RULE

ENVIRONMENTAL PROTECTION AGENCY

40 CFR Part 52

(A-3-FRL-3018-2; EPA Docket No: AM045PA)

Commonwealth of Pennsylvania; Approval of Revision to the Pennsylvania State Implementation Plan

AGENCY: Environmental Protection Agency.

ACTION: Final rule.

Summary: EPA is today withdrawing its former approval of State and local odor emission control regulations as part of the Pennsylvania State Implementation Plan (SIP). EPA believes that these regulations should not be included in the Pennsylvania SIP because they bear no significant relation to attainment and maintenance of the National Ambient Air Quality Standards (NAAQS).

Effective Date: June 19, 1986.

Addresses: Copies of the revision and accompanying documents are available during normal business hours at the following office: U.S. Environmental Protection Agency, Region III, Air Management Division, 841 Chestnut Building, 8th Floor, Philadelphia, PA 19107. Attn: Donna Abrams.

For Further Information Contact:
Donna Abrams (3AM11) at the EPA.
Region III address above or call (215) 597-9134.

Supplementary Information: Under section 110(a)(1) of the Clean Air Act, each State must submit to EPA a SIP that provides for attainment and maintenance of the National Ambient Air Quality Standards (NAAQS). On January 27, 1972, the Pennsylvania Department of Environmental Resources (DER), on behalf of the Commonwealth of Pennsylvania, submitted its SIP to EPA for review and approval. DER's SIP submittal included the Commonwealth's odor emission

regulation and the City of Philadelphia's odor emission regulation (hereinafter collectively referred to as the "State odor emission regulations.")

EPA initially approved portions of the Pennsylvania SIP via a national notice on May 31, 1972 (*See* 37 FR 19889.) In this notice, EPA approved all portions of the State plans unless they were specifically disapproved. These exceptions did not include the State odor emission regulations. Therefore, they were approved by EPA as part of the Pennsylvania SIP.

EPA reaffirmed its approval of the Pennsylvania SIP, including the State odor emission regulations, on November 23, 1983. (*See* 38 FR 32893). In this notice, EPA approved Pennsylvania's plan for attainment and maintenance of the national standards except for specific portions which were listed in the notice. These specific exceptions did not include the State odor emission regulations.

On September 20, 1978, DER submitted to EPA a revision to the Pennsylvania SIP that, among other things, modified the State odor emission regulations by exempting agricultural sources from the control requirements. *See* 40 CFR 52.2020(c)(21) (1984). EPA later approved this SIP revision. *See* 45 FR 56060 (August 22, 1980).

EPA recognizes the problem raised by its approval of the State odor emission regulations. In reviewing SIPs, EPA is governed by the criteria in section 110(a)(2) of the Clean Air Act, which require measures for the attainment and maintenance of the primary and secondary NAAQS. In order for EPA to properly approve a State rule as part of the SIP, the rule must have a significant relationship to attainment and maintenance of a NAAQS.

EPA believes that the State odor emission regulations bear no significant relationship to the attainment and maintenance of any NAAQS. In general, EPA believes that there is no direct or indirect relationship between the State odor emission regulations cited below and any criteria pollutant.

EPA is listing in this final action additional state and city statutory and regulatory citations which were not included in EPA's proposed deletions published on August 12, 1985 (50

FR 32451). These additional citations regulate or control odor emissions. EPA does not believe that the statutory citations were approved as part of the Pennsylvania SIP. However, to eliminate any doubt in the matter, and to the extent that they relate to the control of odors, EPA is listing these statutory provisions in its withdrawal of approval.

The additional regulations added in this final action were inadvertently omitted from EPA's proposed action. EPA believes that its proposed action provided sufficient notice that all state and local regulations relating to the control of odors were being proposed to be deleted from the Pennsylvania SIP. In addition, section 553(b)(B) of the Administrative Procedure Act, 5 U.S.C. 553(b)(B), provides that notice of rulemaking is not required when an agency for good cause finds that notice thereon is impracticable or unnecessary. EPA finds that additional notice is unnecessary here because the Agency's notice (50 FR 32451) generally proposed deletion of all regulations which are related to the control of odors, even though the actual list of regulations have inadvertent omissions. EPA provided extended comment period on the issue of whether any significant relationship could be established between the State odor emission regulations and the attainment or maintenance of any NAAQS. The public had the opportunity to comment on this general issue, with the obvious understanding that all odor emission controls would be deleted if such a relationship was not established. As discussed below, no relationship was established. Therefore, EPA is withdrawing its approval of all State odor emission regulations which relate to the control of odors. In light of the above, a new comment period concerning the additional statutory and regulatory citations contained in this final action would be wholly superfluous.

The statutes and regulations pertaining to odor emission control which will be affected are:

(1) 35 P.S. § 4003(4) (deletion of "odor" from definition);

(2) 35 P.S. § 4003(5) (deletion of reference to odors from definition);

(3) Philadelphia Air Management Code § 3-102(3) (deletion of "odors" from definition);

(4) Philadelphia Air Management Code § 3-102(25) (deletion of definition);

(5) 25 Pa. Code § 121.1 (deletion of reference to odors from definitions);

(6) 25 Pa. Code § 129.14(b)(2) (open burning operations);

(7) Regulation V (Phil. AMC) Section X—Odors;

(8) 25 PA Code § 123.31—Odor Emissions;

(9) Regulation I (Phila. AMC), Section I (A)(3)—Air Contaminant (deletion of reference to odors in definition);

(10) Regulation I (Phila. AMC), Section I (A)(4)—Air Pollution (deletion of reference to odors in definition);

(11) Regulation I (Phila. AMC), Section I (A)(5)—Air Pollution Nuisance (deletion of reference to odors in definition);

(12) Regulation I (Phila. AMC), Section I (A)(25)—Odor (deletion of definition);

(13) Regulation I (Phila. AMC), Section X—Compliance with regulations of Pennsylvania Air Quality Board (deletion of references to odors);

(14) Regulation XI (Phila. AMC), Section III(C)—Odor Emissions.

Because the State odor emission regulations are presently part of the federally approved Pennsylvania SIP, EPA proposed deletion of these regulations on August 12, 1985 (50 FR 32451). EPA provided an extended sixty-day comment period to solicit public comments as to whether any significant relationship could be established between the State odor emission regulations and attainment or maintenance of any NAAQS. Absent this showing, EPA proposed to delete these regulations from the Pennsylvania SIP. As a result of the Notice of Proposed Rulemaking, EPA received approximately forty-five (45) responses with comments. Six (6) of these responses with comments were in support of EPA's proposed action and are detailed in the Technical Support Document for this

Rulemaking action. The remainder of the responses with comments were in opposition to EPA's proposed action. These comments are discussed below.

Public Comments

1. Comment

The federal odor regulations are the only means that we have for controlling polluting emissions such as sulfur dioxide, nitrogen oxides, volatile organic compounds (VOC's) which are precursors to ozone formation and other hazardous air pollutants such as benzene and hydrogen sulfide.

Response: The federal odor regulations are not the only means for controlling polluting emissions such as those mentioned above. There are various regulations which are used to control polluting emissions, such as those mentioned above, other than odor regulations. With regard to Pennsylvania's regulations which are part of the SIP, sulfur compound emissions are regulated under section 129 of the Pennsylvania Air Resource Regulations. Where odor-producing hazardous air pollutants are identified, they have been and may be regulated through specific numerical standards issued under section 111 (New Source Performance Standards) or 112 (National Emission Standards for Hazardous Air Pollutants) of the Clean Air Act or through State and local laws and ordinances.

The City's Air Management Regulation VI is the foremost example in this region of exactly this type of local regulation of toxic air contaminants. Ninety-nine (99) substances have been individually listed, and the City's Department of Health has adopted numerical, health-based guidelines for these substances in the ambient air. Regulation VI authorizes the City to withhold permits from facilities emitting toxic contaminants at levels that pose a health hazard based on these guidelines.

Additionally, the City's Air Management Regulation III covers the control of emissions of oxides of sulfur compounds. Regulation VII controls the emission of nitrogen oxides from stationary sources, and Regulation V regulates the emissions

of VOC's. These hydrocarbon regulations together with the DER regulations do provide an enforceable remedy to protect the public health.

2. *Comment*

Odor is an indication of human carcinogens.

Response: Odor is not necessarily an indication of human carcinogens. Many harmless substances cause odors. Additionally, a substance may be carcinogenic but odorless.

3. *Comment*

If the EPA deletes the odor regulations, there will be no meaningful right of citizens to enforce the odor regulations because the Pennsylvania Air Pollution Control Act does not provide for attorney fees in citizen lawsuit cases.

Response: While EPA is sensitive to this issue, we cannot use this as a basis for retaining the odor regulations in the Pennsylvania SIP.

4. *Comment*

EPA's proposed action is arbitrary and capricious. EPA has the burden of justifying its intent to withdraw.

Response: EPA is merely taking corrective action here to remedy an oversight in inadvertently approving the odor regulations. The Agency has never found any significant relationship between the control of odors and any NAAQS, but it has permitted the public the right to provide comments on this issue during an extended comment period.

5. *Comment*

EPA's proposed action is an abuse of discretion. Pennsylvania may include control measures in its SIP that are stricter than those required by EPA.

Response: EPA's proposed action is not an abuse of discretion. Although Pennsylvania may include control measures in its SIP that are stricter than those required by EPA, it has not been demonstrated that odor control constitutes a stricter control measure or that the control of odor relates to the attainment of an NAAQS.

6. Comment

The connection between odors and the criteria pollutants is easily made. There are odors directly associated with sulfur dioxide, nitrogen dioxide, and with hydrocarbons which are an ozone precursor.

Response: There are odors associated with sulfur dioxide and nitrogen dioxide. The odor threshold for sulfur dioxide is approximately 1 ppm. This threshold value is over seven times greater than the 24-hour standard for SO_2 (0.14 ppm) and thirty-three times greater than the annual standard (0.03 ppm). The odor threshold for nitrogen dioxide is approximately 5 ppm. This level is one hundred times greater than the national standard for NO_2 (0.05 ppm). Therefore, if EPA were to allow levels of SO_2 and NO_2 necessary to reach the threshold at which an odor could be detected for each of these pollutants, the levels would be well in excess of the national standards. If odor regulations were used as a backup to determined excessive concentrations of these two pollutants, it would be a much less stringent standard than those already in place. Additionally, these regulations would have to be less general and more specific to levels of SO_2 and NO_2 and quantifiable reductions in the levels of these pollutants.

With regard to odors as they pertain to hydrocarbons which are ozone precursors, EPA has not been able to establish any relationship, nor have any of the commentors provided any information which shows any technical correlation between controlling odor levels of hydrocarbons and reduction in ozone levels.

7. Comment

The odor regulations assist Philadelphia and Pennsylvania in monitoring VOC emissions from major sources and in controlling VOC emissions from minor sources.

Response: Odor regulations may be used to trace a source of an odor complaint. But once the source of the odor has been established, the odor regulation itself would not be used to reduce levels of VOCs. The Pennsylvania VOC regulations,

which are based on health and welfare effects levels of the compounds in question, would be applied.

The deletion of the odor regulations from the Pennsylvania SIP would not preclude Philadelphia and Pennsylvania from continuing to utilize these regulations as a tool to monitor and control VOC levels.

8. Comment

If EPA deletes 25 Pa. Code 123.31(a) and the Philadelphia Air Management Regulation XI, section 111(c), which are aimed at preventing odor emissions from incinerators, citizens will have no meaningful means for preventing malodorous, unhealthful incinerator operations. These operations require incinerator operators to operate their facilities at a minimum of 1200°F. It is now known that temperatures above 1700°F are desirable in preventing the formation of dioxins and furans.

Response: The deletion from the SIP of the odor emission control regulations would not preclude the City and DER from enforcing their regulations. However, with specific respect to dioxins and furans, these compounds are being considered to be listed as hazardous air pollutants. If and when these contaminants are listed, regulations would be developed in order to control the formation of these pollutants. The formation of dioxins and furans is a very complex mechanism with many variables other than temperature involved in their formation. The odor regulations should not be perceived as a means for controlling dioxin and furan formation.

9. Comment

The control of Total Reduced Sulfur (TRS) emissions is related solely to reduction of odors.

Response: The regulations governing TRS emissions are based on the health and welfare effects of certain levels of hydrogen sulfide, not on the odor threshold level (which is much lower) for hydrogen sulfide.

Conclusion

EPA's decision to adopt this revision is based on a determination, after a thorough review of the public comments, that there is no significant relationship between odor emission control regulations and attainment or maintenance of any NAAQS. These regulations were inadvertently approved as part of Pennsylvania's SIP and, therefore, EPA is today deleting these regulations from the Pennsylvania SIP. Additionally, EPA's withdrawal is consistent with prior administrative rulemaking. EPA declined to approve a SIP provision governing odor on May 12, 1981 that had been submitted by Guam (46 FR 26303). In another instance, EPA took similar action with respect to the Nevada SIP on August 27, 1981 (46 FR 43141). In a third instance, EPA refused to approve odor provisions in the Iowa SIP (47 FR 22532, 22532, May 25, 1982).

EPA's decision to delete the State Odor Regulations from the Pennsylvania SIP does not preclude the State from submitting to EPA quantifiable, specific, odor regulations which, when implemented, demonstrate reductions in emissions which would significantly contribute to attainment or maintenance of a NAAQS.

Furthermore, EPA's deletion of the State Odor Regulations as stated previously, does not preclude the State and local agencies from enforcing their odor regulations.

Under section 307(b)(1) of the Act, petitions for judicial review of this action must be filed in the United States Court of Appeals for the appropriate circuit by July 21, 1986. This action may not be challenged later in proceedings to enforce its requirements (*See* 307(b)(2)).

The Office of Management and Budget has exempted this rule from the requirements of section 3 of Executive Order 12291.

List of Subjects in 40 CFR Part 52

Air pollution control, Ozone, Sulfur oxides, Nitrogen dioxide, Hydrocarbons, Intergovernmental relations. Reporting and recordkeeping requirements.

Dated: May 2, 1986

Lee M. Thomas

Administrator

PART 52—[AMENDED]

Subpart NN—Pennsylvania

1. The authority citation for Part 52 continues to read as follows:

Authority: 42 U.S.C. 7401-7642.

2. Section 52.2023 is amended by adding paragraph (h) as follows:

§ 52.2023 Approval Status.

(h) The Administrator withdraws its prior approval (see Subpart NN 52.2020 (b)) of the following odor emission control regulations:

(1) 35 P.S. § 4003(4) (deletion of "odor" from definition);

(2) 35 P.S. § 4003(5) (deletion of reference to odors from definition);

(3) Philadelphia Air Management Code § 3-102(3) (deletion of "odors" from definition);

(4) Philadelphia Air Management Code § 3-102(25) (deletion of definition);

(5) 25 Pa. Code § 121.1 (deletion of reference to odors from definitions);

(6) 25 Pa. Code § 129.14(b)(2) (open burning operations);

(7) Regulation V (Phil. AMC) Section X—Odors;

(8) 25 PA Code § 123.31—Odor Emissions;

(9) Regulation I (Phila. Air Management Code), Section I (A)(3)—Air Contaminant (deletion of reference to odors in definition);

(10) Regulation I (Phila. AMC), Section I (A)(4)—Air Pollution (deletion of reference to odors in definition);

(11) Regulation I (Phila. AMC), Section I (A)(5)—Air Pollution Nuisance (deletion of reference to odors in definition);

(12) Regulation I (Phila. AMC), Section I (A)(25)—Odor (deletion of definition);

(13) Regulation I (Phila. AMC), Section X—Compliance with regulations of Pennsylvania Air Quality Board (deletion of references to odors);

(14) Regulation XI (Phila. AMC), Section III (C)—Odor Emissions.

[FR Doc. 86-11174 Filed 5-19-86: 9:45 am]

PENNSYLVANIA POLITICAL SUBDIVISION TORT CLAIMS ACT

§ 8541. Governmental immunity generally

Except as otherwise provided in this subchapter, no local agency shall be liable for any damages on account of any injury to a person or property caused by any act of the local agency or an employee thereof or any other person.

1980, Oct. 5, P.L. 693, No. 142, § 221(*l*), effective in 60 days.

§ 8542. Exceptions to governmental immunity

(a) Liability imposed.—A local agency shall be liable for damages on account of an injury to a person or property within the limits set forth in this subchapter if both of the following conditions are satisfied and the injury occurs as a result of one of the acts set forth in subsection (b):

(1) The damages would be recoverable under common law or a statute creating a cause of action if the injury were caused by a person not having available a defense under section 8541 (relating to governmental immunity generally) or section 8546 (relating to defense of official immunity); and

(2) The injury was caused by the negligent acts of the local agency or an employee thereof acting within the scope of his office or duties with respect to one of the categories listed in subsection (b). As used in this paragraph, "negligent acts" shall not include acts or conduct which constitutes a crime, actual fraud, actual malice or willful misconduct.

(b) Acts which may impose liability.—The following acts by a local agency or any of its employees may result in the imposition of liability on a local agency.

(1) *Vehicle liability.*—The operation of any motor vehicle in the possession or control of the local agency. As used in this paragraph, "motor vehicle" means any vehicle which is self-propelled and any attachment thereto,

including vehicles operated by rail, through water or in the air.

(2) *Care, custody or control of personal property.*—The care, custody or control of personal property of others in the possession or control of the local agency. The only losses for which damages shall be recoverable under this paragraph are those property losses suffered with respect to the personal property in the possession or control of the local agency.

(3) *Real property.*—The care, custody or control of real property in the possession of the local agency, except that the local agency shall not be liable for damages on account of any injury sustained by a person intentionally trespassing on real property in the possession of the local agency. A used in this paragraph, "real property" shall not include:

(i) trees, traffic signs, lights and other traffic controls, street lights and street lighting systems;

(ii) facilities of steam, sewer, water, gas and electric systems owned by the local agency and located within rights-of-way;

(iii) streets; or

(iv) sidewalks.

(4) *Trees, traffic controls and street lighting.*—A dangerous condition of trees, traffic signs, lights or other traffic controls, street lights or street lighting systems under the care, custody or control of the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(5) *Utility service facilities.*—A dangerous condi-

tion of the facilities of steam, sewer, water, gas or electric systems owned by the local agency and located within rights-of-way, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(6) *Streets.*—

(i) A dangerous condition of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(ii) A dangerous condition of streets owned or under the jurisdiction of Commonwealth agencies, if all of the following conditions are met:

(A) The local agency has entered into a written contract with a Commonwealth agency for the maintenance and repair by the local agency of such streets and the contract either:

(i) had not expired or been otherwise terminated prior to the occurrence of the injury; or

(ii) if expired, contained a provision that expressly established local agency responsibility beyond the term of the contract for injuries arising out of the local agency's work.

(B) The injury and dangerous condition were directly caused by the negligent performance of its duties under such contract.

(C) The claimant must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition.

(7) *Sidewalks.*—A dangerous condition of sidewalks within the rights-of-way of streets owned by the local agency, except that the claimant to recover must establish that the dangerous condition created a reasonably foreseeable risk of the kind of injury which was incurred and that the local agency had actual notice or could reasonably be charged with notice under the circumstances of the dangerous condition at a sufficient time prior to the event to have taken measures to protect against the dangerous condition. When a local agency is liable for damages under this paragraph by reason of its power and authority to require installation and repair of sidewalks under the care, custody and control of other persons, the local agency shall be secondarily liable only and such other persons shall be primarily liable.

(8) *Care, custody or control of animals.*—The care, custody or control of animals in the possession or control of a local agency, including but not limited to police dogs and horses. Damages shall not be recoverable under this paragraph on account of any injury caused by wild animals, including but not limited to bears and deer, except as otherwise provided by statute.

(c) Limited definition.—As used in this section the

amount of time reasonably required to take protective measures, including inspections required by law, shall be determined with reference to the actual equipment, personnel and facilities available to the local agency and the competing demands therefor.

1980, Oct. 5, P.L. 693, No. 142, § 221(*l*), effective in 60 days. As amended 1982, June 10, P.L. 452, No. 132, § 1, imd. effective.

§ 8545. Official liability generally

An employee of a local agency is liable for civil damages on account of any injury to a person or property caused by acts of the employee which are within the scope of his office or duties only to the same extent as his employing local agency and subject to the limitations imposed by this subchapter.

§ 8546. Defense of official immunity

In any action brought against an employee of a local agency for damages on account of an injury to a person or property based upon claims arising from, or reasonably related to, the office or the performance of the duties of the employee, the employee may assert on his own behalf, or the local agency may assert on his behalf:

(1) Defenses which are available at common law to the employee.

(2) The defense that the conduct of the employee which gave rise to the claim was authorized or required by law, or that he in good faith reasonably believed the conduct was authorized or required by law.

(3) The defense that the act of the employee which gave rise to the claim was within the policymaking discretion granted to the employee by law. For purposes of this subsection, ...

§ 8548. Indemnity

(a) Indemnity by local agency generally.—When an action is brought against an employee of a local agency for

damages on account of an injury to a person or property, and he has given timely prior written notice to the local agency, and it is judicially determined that an act of the employee caused the injury and such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties, the local agency shall indemnify the employee for the payment of any judgment on the suit.

(b) Indemnity by employee generally.—No employee of a local agency shall be liable to the local agency for any surcharge, contribution, indemnity or reimbursement for any liability incurred by the local agency for damages on account of an injury to a person or property caused by an act of the employee which was within the scope of his office or duties or which he in good faith reasonably . . . .

§ 8549. Limitation on damages

In any action brought against an employee of a local agency for damages on account of an injury to a person or property in which it is judicially determined that the act of the employee caused the injury and that such act was, or that the employee in good faith reasonably believed that such act was, within the scope of his office or duties, damages shall be recoverable only within the limits set forth in this subchapter.

§ 8550. Willful misconduct

In any action against a local agency or employee thereof for damages on account of an injury caused by the act of the employee in which it is judicially determined that the act of the employee caused the injury and that such act constituted a crime, actual fraud, actual malice or willful misconduct, the provisions of sections 8545 (relating to official liability generally), 8546 (relating to defense of official immunity), 8548 (relating to indemnity) and 8549 (relating to limitation on damages) shall not apply.

§ 8553. Limitations on damages

(a) General rule.—Actions for which damages are limited by reference to this subchapter shall be limited as set forth in this section.

(b) Amounts recoverable.—Damages arising from the same cause of action or transaction or occurrence or series of causes of action or transactions or occurrences shall not exceed $500,000 in the aggregate.

(c) Types of losses recognized.—Damages shall be recoverable only for:

(1) Past and future loss of earnings and earning capacity.

(2) Pain and suffering in the following instances:

(i) death; or

(ii) only in cases of permanent loss of a bodily function, permanent disfigurement or permanent dismemberment where the medical and dental expenses referred to in paragraph (3) are in excess of $1,500.

(3) Medical and dental expenses including the reasonable value of reasonable and necessary medical and dental services, prosthetic devices and necessary ambulance, hospital, professional nursing, and physical therapy expenses accrued and anticipated in the diagnosis, care and recovery of the claimant.

(4) Loss of consortium.

(5) Loss of support.

(6) Property losses.

(d) Insurance benefits.—If a claimant receives or is entitled to receive benefits under a policy of insurance other than a life insurance policy as a result of losses for which damages are recoverable under subsection (c), the amount of such benefits shall be deducted from the amount of damages which would otherwise be recoverable by such claimant.

PENNSYLVANIA AIR POLLUTION CONTROL ACT, 35 P.S. 4010 (f):

(f) Suits to abate such nuisances or suits to restrain or prevent any violation of this act may be instituted at law or in equity by any resident of the Commonwealth after thirty (30) days notice has first been served upon the Attorney General of the intention to so proceed. Such proceedings may be prosecuted in the court of common pleas of the county where the activity has taken place, the condition exists, or the public is affected, and to that end jurisdiction is hereby conferred in law and equity upon such courts. Except in cases of emergency where, in the opinion of the court, the exigencies of the case require immediate abatement of said nuisances, the court may, in its decree, fix a reasonable time during which the person responsible for the nuisances may make provision for the abatement of the same. The court may provide for the payment of civil penalty as specified in section 9.1 of this act[3] during the time when air pollution will continue under its decree. It shall not be necessary to the maintenance of such a suit by any resident of the Commonwealth that he shall prove that he has suffered or will suffer any personal loss or damage.

UNITED STATES COURT OF APPEALS
FOR THE THIRD CIRCUIT

No. 86-3380

CONCERNED CITIZENS OF BRIDESBURG
and
DELAWARE VALLEY CITIZENS' COUNCIL
FOR CLEAN AIR,

Petitioners

v.

UNITED STATES ENVIRONMENTAL PROTECTION
AGENCY
and
LEE M. THOMAS, ADMINISTRATOR,
UNITED STATES ENVIRONMENTAL
PROTECTION AGENCY,

Respondents

On Petition for Review of Final Rule
Published May 20, 1986 by Lee M. Thomas,
Administrator, U.S. Environmental Protection Agency

Argued May 22, 1987

BEFORE: SLOVITER, BECKER and
GARTH, *Circuit Judges*

(Filed December 18, 1987)

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OPINION OF THE COURT

BECKER, *Circuit Judge.*

The Clean Air Act, 42 U.S.C. §§ 7401-28 (1982) ("the Act"), "creates a partnership between the states and the federal government": the federal government, through the Environmental Protection Agency ("EPA"), determines the ends—the standards of air quality—while the states are given the initiative and broad responsibility to determine the means to achieve those ends. *Bethlehem Steel Corp. v. Gorsuch*, 742 F.2d 1028, 1036 (7th Cir. 1984). Thus, under Part A of the Act, states have the primary authority for establishing a specific plan, known as a State Implementation Plan ("SIP"), for achieving and maintaining acceptable levels of air pollutants in the atmosphere. The EPA sets those levels through National Ambient Air Quality Standards ("NAAQS"). The EPA may also, for limited reasons, demand revisions in a SIP. But because of the state's primacy over the terms of the SIP, the Act requires the EPA, before modifying the SIP, to suggest proposed revisions to the state, which must then hold public hearings and respond. Only if the state does not suitably respond may the EPA alter the terms of a plan itself. *See Bethlehem Steel Corp. v. EPA*, 723 F.2d 1303, 1309-10 (7th Cir. 1983).

This petition for review, brought by two citizens groups,

challenges an EPA final rule rescinding fourteen state and local odor regulations contained in the Pennsylvania SIP. The EPA has not set NAAQS for odors, and claims that the odor regulations have no significant relationship to the achievement of any other NAAQS. The EPA therefore contends that it lacks statutory authority to include odor regulations in a SIP. The citizens groups disagree, on the ground that the odor regulations assist the state regulation of pollutants for which the EPA has set standards.

We do not reach this challenge, however, because we agree with the citizens groups' threshold claim that the EPA had a statutory obligation to propose its revisions to Pennsylvania for a hearing and reaction before directly deleting the odor regulations. The EPA contends that these procedures were not necessary because the removal of the odor regulations was not a SIP revision but was merely a correction of an EPA error made thirteen years before. According to the EPA, a revision occurs only when the EPA imposes obligations on the state, not when the EPA determines that portions of a SIP lie outside statutory authority.

We disagree. Although the question is not free from difficulty, because Congress apparently did not contemplate the need for revisions on the grounds cited by the EPA here, we read the statute to require that all SIP modifications occur through the designated revision procedure. Although the EPA action does not impose requirements on the state, the state may make a SIP more stringent than necessary to achieve NAAQS. *See Union Electric Co. v. EPA*, 427 U.S. 246, 262-65 (1976). Therefore, instead of merely deleting its odor regulations, Pennsylvania might have attempted to tailor them more narrowly to pollutants that are regulated nationally, or it could have compensated for the deletion of odor regulations by strengthening other portions of the SIP.

Furthermore, the modification involved here was no inadvertent mistake. The EPA not only approved the SIP odor provisions at issue here, but twice approved modifications to them without suggesting that odor regulations as a whole are unauthorized. The policy of rejecting odor regulations arose

years later. An attempt to change a SIP thirteen years after its creation, particularly when it results from a wholesale policy change in the interim, cannot be exempted from procedural requirements on the grounds that it is the correction of a mistake.

For these reasons, explicated more fully below, we grant the petition for review and remand so that the EPA can propose the SIP revisions to Pennsylvania and for Pennsylvania to hold the mandated public hearing.

I. STATUTORY STRUCTURE

The portion of the Act that concerns us in this case came into existence in the Clean Air Amendments of 1970, Pub. L. No. 91-604, 84 Stat. 1676 (1970) ("the Amendments"). In essence, the Amendments, described in detail in *Train v. Natural Resources Defense Council*, 421 U.S. 60, 64-67 (1975), require the EPA to publish a list of specific air pollutants which, in the Administrator's judgment, contribute to air pollution and which endanger the public health or welfare. 42 U.S.C. § 7408. The EPA is also required to issue air quality criteria for each of these pollutants, 42 U.S.C. § 7408(a)(2), and to prescribe primary and secondary NAAQS therefor. 42 U.S.C. § 7409. These NAAQS require that states lower the concentration of certain pollutants in the outdoor air below levels that the EPA has deemed dangerous to public health or welfare. Since 1970, the EPA has established NAAQS for six "criteria pollutants": particulate matter, sulfur dioxide, carbon monoxide, nitrogen dioxide, ozone, and lead. *See* 40 C.F.R. §§ 50.1-50.12 (1986). The EPA has not listed "odors" as one of the dangerous pollutants, nor has it established any standard for odors.

Although the Amendments required states to attain air quality of federally specified standards within a federally specified period of time, the Amendments retained "the premise of the earlier Clean Air Act 'that the prevention and control of air pollution at its source is the primary responsibility of States and local governments.' " *Train*, 421 U.S. at 64 (quoting Air Quality Act of 1967, 81 Stat. 485 (now codified at 42

U.S.C. § 7401(a)(3))). Thus, the Amendments left the mechanics of achieving NAAQS to the states. Section 7410(a) requires each state to formulate and submit to the EPA a SIP detailing regulations and source-by-source emissions limitations that will conform the air quality within its boundaries to the NAAQS. The SIP basically embodies a set of choices regarding such matters as transportation, zoning and industrial development that the state makes for itself in attempting to reach the NAAQS with minimum dislocation.

Because the states have primary responsibility for achieving air quality standards, the EPA has limited authority to reject a SIP. Section 7410(a)(2) requires the Administrator to approve a SIP if "it was adopted after reasonable notice and hearing" and if it meets the eleven additional requirements of § 7410(a)(2)(A)-(K). These requirements serve principally to assure that the state attains the NAAQS quickly.

> The Act gives the Agency no authority to question the wisdom of a State's choices of emission limitations if they are part of a plan which satisfies the standards of § [7410(a)(2)], and the Agency may devise and promulgate a specific plan of its own only if a State fails to submit an implementation plan which satisfies those standards [§ 7410(c)].

Train, 421 U.S. at 79. Indeed, "the States may adopt . . . more rigorous emission standards, and the Administrator must approve plans containing them if the minimum federal requirements are satisfied." *Union Electric Co.*, 427 U.S. at 262 n.9. Once the EPA approves regulations contained in a SIP, the state and federal governments have obligations to enforce them, 42 U.S.C. § 7413, and private citizens may enforce them through citizen suits, for which they may obtain attorney's fees if successful, 42 U.S.C. § 7604.

In addition to placing primary responsibility on the states to create SIPs, the Act also places primary responsibility on the states for their revision. Thus, § 7410(a)(2)(H) requires a SIP to provide for its own revision under certain circumstances. The EPA's authority to approve or reject these revi-

sions is as limited as its authority to reject the SIP originally. It must approve the revision if it meets the general requirements of § 7410(a)(2), which are the requirements imposed on the original SIP, and if it "has been adopted by the State after reasonable notice and public hearings." 42 U.S.C. § 7410(a)(3)(A). Only if the state fails to respond within sixty days to a proposal for revisions by the EPA may the EPA proceed to revise the SIP itself "after consideration of any State hearing record" or after its own public hearings. 42 U.S.C. § 7410(c)(1).

II. THE PENNSYLVANIA ODOR REGULATIONS AND THE ADMINISTRATIVE PROCEEDINGS IN THE PRESENT CASE

Pennsylvania's Department of Environmental Resources submitted most of the odor regulations at issue in this case as part of its original SIP proposal to the EPA on January 27, 1972.[1] As the word "odor" suggests, these regulations regulate "smells or aromas" and in substance restrict or prohibit the discharge of odors that seriously offend people in the neighborhood because of inherent chemical or physical properties of the emission.[2] The EPA approved these regulations in May of that year. *See* 37 Fed. Reg. 10,889 (May 31, 1972).[3] In

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1. For a list of the statutes and regulations pertaining to odor emission control that were affected by the EPA's final rule, *see* 51 Fed. Reg. 18,438 (May 20, 1986).

2. For example, the Philadelphia Air Management Code, which is included in the SIP, defines odors as follows:

> **Odors**—Smells or aromas which are unpleasant to persons, or which tend to lessen human food and water intake, interfere with sleep, upset appetite, produce irritation of the upper respiratory tract, or create symptoms of nausea, or which by their inherent chemical or physical nature, or method of processing, are or may be detrimental or dangerous to health. Odors and smell are used herein interchangeably.

Philadelphia Air Management Code § 3-102(25).

3. In view of the fact that we do not reach the substantive contentions made by the parties, we need not decide exactly what the regulations permit or forbid.

addition, the EPA has, on two additional occasions, taken action regarding the Pennsylvania SIP without objecting to the presence of the odor regulations.[4]

In 1977, Congress directed the EPA to study the health effects of odorous emissions and the feasibility of prescribing criteria and NAAQS for them under § 7409 of the Clean Air Act. *See* Pub. L. No. 95-95, § 403(b), 91 Stat. 792 (1977) (not codified). After studying the issue, the EPA, in 1980, recommended against listing offensive odors produced by industrial emissions as criteria pollutants.[5] The EPA also recommended against further approval of odor emission regulations contained in proposed SIPs. The bases of this recommendation were that: (1) odors are not caused by a single pollutant, thus it would be difficult to associate a specific health or welfare effect with a given odor concentration; (2) it would be difficult to develop objective standards for measuring the offensiveness of odors; (3) state and local odor controls and procedures were adequate; and (4) regulations that attempted to detect high concentrations of harmful pollutants based upon odor sensitivity would be overinclusive—i.e., they would prohibit a number of odorous emissions that are not harmful to the public health. *See* Office of Air, Noise and Radiation & Office of Air Quality Planning and Standards, U.S. EPA *Regulatory Option for the Control of Odors* 5, 69-72 (1980).

Thus, after 1980, the EPA's policy toward odor regulation changed. Although the EPA had previously approved SIP's that contained odor regulations, it now declined to approve similar proposals.[6] In April 1983, the EPA notified the Penn-

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4. *See* 38 Fed. Reg. 32,884 (Nov. 28, 1973); 45 Fed. Reg. 56,060 (Aug. 20, 1980).

5. *See* Office of Air, Noise and Radiation & Office of Air Quality Planning and Standards, U.S. EPA, *Regulatory Options for the Control of Odors* (1980).

6. *See, e.g.*, 46 Fed. Reg. 26,303 (May 12, 1981) (taking no action on odor regulations in Guam SIP); 46 Fed. Reg. 43,141 (Aug. 27, 1981) (taking no action on odor regulations in Nevada SIP); 47 Fed. Reg. 22,531 (May 25, 1982) (taking no action on Iowa odor regulations where odor regulations were not included in SIP).

sylvania Department of Environmental Resources that its earlier approval of odor regulations was in error and that it would not continue to enforce these regulations.[7] However, the EPA did not at that time proceed formally to remove the odor regulations.

The EPA's decision to formally withdraw its approval of the odor regulations in the Pennsylvania SIP appears to have been triggered by a federal district court complaint brought by one of the petitioners in this case. *See Concerned Citizens of Bridesburg v. City of Philadelphia*, 643 F. Supp. 713 (E.D. Pa. 1986). In that case, Concerned Citizens, consisting of residents of an industrial neighborhood in Northeast Philadelphia, asserted both federal and state claims seeking to enforce the odor emission regulations of the Pennsylvania SIP against Philadelphia's Northeast Water Pollution Control Plant. At the request of the District Court, the EPA filed an amicus brief in which it indicated that its previous approval of the odor regulations had been inadvertent. Furthermore, the EPA stated that because the odor regulations bore "no relation to attainment or maintenance of the [NAAQS]," it planned to withdraw its prior approval and formally delete the odor regulations from the SIP. EPA Amicus Brief at 5, *Concerned Citizens of Bridesburg*, 643 F. Supp. 713 (E.D. Pa. 1986) (No. 85-14).

In August, 1985, before the decision in the *Concerned Citizens* district court case, the EPA published notice of its intent to delete the odor regulations from the Pennsylvania SIP. 50 Fed. Reg. 32,451 (Aug. 12, 1985). During the next nine months, the EPA received forty-five public comments to its proposal, thirty-nine of which opposed the EPA action.[8]

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7. *See* Letter from EPA to James Salvaggio, Chief of Planning Section, Pennsylvania Department of Environmental Resources, Bureau of Air Quality Control (Apr. 1, 1983).

8. The Philadelphia City Council held a hearing on EPA's proposal and then adopted Resolution No. 576 (Oct. 10, 1985) in opposition. However, the Philadelphia City Solicitor, who was defending the Concerned Citizens district court suit, supported the proposal. The Pennsylvania House of Representatives passed Resolution No. 165 (Oct. 23, 1985) opposing the EPA's proposed action. However, the Pennsylvania Department of Environmental

Comments filed by Concerned Citizens of Bridesburg contended that the EPA could not remove the odor regulations so long as they are "related directly or indirectly to any EPA criteria pollutant." J.A. at 451a. Concerned Citizens claimed that the odor regulations have a "direct relationship" to the regulation of sulfur dioxide and nitrogen dioxide and an "indirect" relationship to the regulation of ozone. J.A. at 449a-50a.

In May of 1986, the EPA responded to the public comments, and issued its final rule withdrawing the odor regulations from the Pennsylvania SIP without holding a public hearing. The EPA responded specifically to the comments of petitioners' counsel, noting that the odor regulations at issue were far too broad and general, encompassing both criteria and non-criteria pollutants. The EPA's final rule pointed out that "[m]any harmless substances cause odors," while "a substance may be carcinogenic but odorless." 51 Fed. Reg. 18,438, 18,439 (May 20, 1986). The EPA noted that odors are caused not by a single pollutant, but by "combinations of numerous odorants"; and that individual sensitivity and responses to odors are also highly subjective and highly vari-

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Resources did not object. We note, however, that the Department disagreed with the proposal:

> The Department does not agree that the odor regulation is unimportant in attaining and maintaining the ambient standards. The odor regulations are used as an adjunct to the VOC regulations and provide an additional avenue for addressing VOC emissions. This is especially true in our involvement with smaller sources which emit VOC at levels less than the Section 129.52 *de minimis* level.
>
> The withdrawal of the SIP approval is inconsistent with EPA's requirement for the Commonwealth to adopt regulations for control of total reduced sulfur (TRS) compounds from kraft pulp mills. The levels of these compounds in the areas of the sources do not appear to be of consequence with respect to the health of residents in the area. The control of TRS emissions is related solely to reduction of odors. J.A. at 404.

Letter from James K. Hambright, Director, Bureau of Air Quality Control, Pennsylvania Department of Environmental Resources, to Donna Abrams, Region III, Air Management Division, U.S. E.P.A. (Sept. 15, 1985).

able. EPA, Technical Support Document No. AM045PA at 7-8 (Dec. 24, 1985).[9] The EPA concluded that the odor regulations "should not be included in the Pennsylvania SIP because they bear no significant relation to attainment and maintenance of the [NAAQS]." 51 Fed. Reg. at 18,438. The EPA stated, however, that it did not preclude Pennsylvania from submitting revised odor regulations that were "quantifiable [and] specific" and "which, when implemented, demonstrate reductions in emissions which would significantly contribute to attainment or maintenance of a NAAQS." *Id.* at 18,440.[10] Within sixty days, Concerned Citizens and another citizens group, the Delaware Valley Citizens' Council for Clean Air, brought this petition for review under 42 U.S.C. § 7607(b).[11]

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9. The EPA pointed out further that even if the odor regulations did happen to be applied to criteria pollutants, as to sulfur dioxide and nitrogen dioxide, the odor thresholds were far in excess of the NAAQS for those pollutants, and thus regulations based solely on odor were ineffective in enforcing the NAAQS. EPA, Technical Support Document No. AM045PA at 7-8. As for the use of odor regulations to enforce the ozone NAAQS through control of volatile organic compounds, the EPA stated that it had not found any technical correlation between controlling odor levels of these compounds and the reduction in ozone levels. *See* 51 Fed. Reg. at 18,439.

10. The EPA also emphasized that Pennsylvania had available on its books many other state and federal regulations "far more specific and effective" for controlling the emissions of concern here. Resp. Br. at 12.

11. Subsequent to the commencement of this action, Judge VanArtsdalen filed an opinion in Concerned Citizen's district court case, enjoining the emission of odors from Philadelphia's Northeast Pollution Control Plant. *See* Concerned Citizens of Bridesburg v. City of Philadelphia, 643 F. Supp. 713 (E.D. Pa. 1986). In light of the EPA's deletion of the odor regulations from the Pennsylvania SIP, however, the district court granted petitioner relief solely on its pendent state common law nuisance claim. Petitioner's claim for relief and attorneys' fees under § 7604(d) was denied. The district court's amended order provided, however:

> In the event that the action of the EPA eliminating the State and city odor regulations from the Pennsylvania SIP is held invalid, the plaintiffs may then seek additional relief under the Clean Air Act, including the award of attorney's fees and costs pursuant to 42 U.S.C. § 7604(d), and the Court shall thereupon determine whether any such requested additional relief shall be granted.

Concerned Citizens of Bridesburg v. City of Philadelphia, No. 85-14, slip op.

III. DISCUSSION

Petitioners present both procedural and substantive claims. Procedurally, they claim that the EPA violated statutory requirements by failing to propose the SIP revision to Pennsylvania and by failing to hold a public hearing. Substantively, they claim that the EPA has no authority to reject Pennsylvania's odor regulations, because those regulations are significantly related to the NAAQS and because they otherwise satisfy the requirements of § 7410(a)(2). Finally, in a mixed substantive and procedural claim, petitioners contend that the EPA has failed to provide a sufficient explanation for its change in policy toward odor regulations. Because we agree with petitioners' purely procedural claim that the EPA should have submitted these proposed regulations to the state and held a hearing, we need not reach petitioners' other contentions.

A.

We begin with a background reference to the various sections of the Clean Air Act bearing upon the procedure for revising a SIP. Section 7410(a)(2)(H) requires the state to have a provision for revising its SIP. Section 7410(a)(3)(A) requires the EPA to approve a revision proposed by the state so long as it meets the basic requirements of a SIP and so long as the state adopted the revision after "reasonable notice and public hearings." And § 7410(c)(1) provides that:

> The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if—
>
> > . . . (C) the State fails, within 60 days after notification by the Administrator or such longer period as he may prescribe, to revise an implementation plan as required pursuant to a provision of its plan referred to in subsection (a)(2)(H) of this section.

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at 3 (E.D. Pa. August 21, 1986). Concerned Citizens' appeal, No. 87-1092, is pending before another panel of this court.

42 U.S.C. § 7410(c)(1). Because of these sections, all parties agree that if the EPA has effected a "revision" in the Pennsylvania SIP (or, as the EPA puts it, "a new SIP for Pennsylvania" Resp. Br. at 40) within the meaning of these sections, it has done so improperly, for it should have proposed the revision to the state for the state to conduct a hearing.

B.

In response to petitioners' contentions, the EPA claims that its deletion of the odor regulations does not constitute a revision of the SIP but merely "a revision of EPA's own prior action." Resp. Br. at 40. It submits that "the final rule constitutes EPA's effort not to promulgate a new SIP for Pennsylvania, but to bring EPA's exercise of approval authority into conformity with law." *Id.* The EPA now believes the odor regulations to be outside its authority under the Clean Air Act. In support of this contention, the EPA points to the specific phrasing of § 7410(a)(2)(H), the subsection that requires a SIP to provide for its own revision. The section states that the SIP must provide for revision:

> (i) from time to time as may be necessary to take account of revisions of [NAAQS] or the availability of improved or more expeditious methods of achieving such primary or secondary standard; or (ii) . . . whenever the Administrator [of the EPA] finds on the basis of information available to him that the plan is substantially inadequate to achieve the [NAAQS] which it implements or to otherwise comply with any additional requirements established under the Clean Air Act Amendments of 1977.

45 U.S.C. § 7410(a)(2)(H). The EPA contends that the change in the SIP *sub judice* has occurred for none of the purposes spelled out in this section: no NAAQS has been changed; no improved or more expeditious methods or technologies have become available; and the EPA has not found the Pennsylvania SIP substantially inadequate to achieve an NAAQS. Contending that this section defines the meaning of "revision," the EPA claims that its actions do not amount to a revision,

and that it therefore need not comply with the procedural requirements of those sections dealing with SIP revisions.

We reject the EPA's contentions first because we believe that the revision sections are applicable to the SIP modification undertaken in this case. As a matter of plain English usage, the term revision encompasses any modification in the requirements of a plan, including "a change in the plan itself which deletes [a] requirement." *Train*, 421 U.S. at 89. Indeed, the EPA's own description of its action indicates the appropriateness of the term revision to the changes in the Pennsylvania SIP. The Federal Register notice of the Final Rule is entitled: "Commonwealth of Pennsylvania; Approval of *Revision* to the Pennsylvania State Implementation Plan." *See* 51 Fed. Reg. at 18,438 (emphasis added).

This common understanding also fits within the statutory structure. The sections dealing with SIP revisions complement the sections dealing with a SIP's original creation. In either situation, the state has an opportunity to pass first upon the mechanics of achieving compliance with air quality standards, and the statutory structure reveals no reason why the modifications undertaken here should be treated in a different fashion.

We agree that § 7410(a)(2)(H), which requires a SIP to provide for its own revision for certain broad enumerated reasons, does not specifically address the situation here—a change required because the EPA no longer considers a portion of a SIP related to the NAAQS. We note, however, that § 7410(a)(2) as a whole, which not only contains the revision provision but which enumerates the ground on which the EPA may reject a portion of a SIP, also fails specifically to authorize the EPA to reject a portion of a SIP on the grounds that it is unrelated to a NAAQS. If we were to construe § 7410(a)(2)(H) as narrowly as the EPA would like, logic would compel us to construe § 7410(a)(2) just as narrowly. That, however, is a position that the EPA does not advance and one with which we suspect it would be uncomfortable. Such a construction would suggest that the EPA does not have to propose a revision on this ground to a state, but it would

also suggest that the EPA cannot require such a revision at all. Such a construction would allow the EPA to reject a portion of a SIP only for grounds enumerated in (a)(2). The grounds relied upon by the EPA here, however, are not so enumerated.

We believe that Congress simply did not contemplate that SIPs might include matters unrelated to NAAQS; it therefore neither specifically authorized the EPA to reject a portion of a SIP on that ground, nor required that SIPs include provisions for their own revision on that ground. Section 7410(a)(2)(H) does, however, seem to include all the reasons for revision contemplated by Congress, including changes in EPA policy. Thus, although there is no evidence Congress contemplated the kind of revision at issue here, subsections 7410(a)(2)(H), (a)(3)(A), and (c)(1) establish a fundamental design of Clean Air Act enforcement that would be disrupted by the result the EPA now advances. Attempting to fit this particular action within the most appropriate section of the statute, considering the statutory structure and the plain meaning of the word "revision," we believe that the EPA's action here may best be described as a revision.

C.

Not only does the proposed action well fit the revision provisions, but the statute also does not provide any authority for modifying an existing SIP other than through the revision provisions. Faced with this problem, the EPA has offered two possible sources of authority for modifying the SIP without proposing the modification to the state. Neither of these suggestions, however, is convincing.

First, the EPA asserts that "it is an established principle of administrative law that an agency's power to reconsider is 'inherent in the power to decide.' " Resp. Br. at 44 n. 17 (citing cases). *See Trujillo v. General Electric Co.*, 621 F.2d 1084, 1086 (10th Cir. 1980); *United States v. Sioux Tribe*, 616 F.2d 485, 493 (Ct. Cl.), *cert. denied*, 446 U.S. 953 (1980). The EPA claims that it is here using this inherent authority to correct an inadvertent mistake.

Any implicit authority to reconsider, however, must be

limited by the original grant of authority. Because § 7410(a)(2) requires the Administrator to approve or disapprove of a plan "within four months," that time period must place at least reasonable limits on the Administrator's authority to reconsider. A change after 13 years is *a fortiori* a revision. Moreover, in *Detroit Edison Co. v. EPA*, 496 F.2d 244, 248-49 (6th Cir. 1974), the court held that a proposed "clarification" by the EPA of a SIP coming six months after promulgation was not a "clarification" but a revision, because it effected substantial change.

Neither are we persuaded by the EPA's reference to the revisions as "corrections" and its reference to the original approvals as "inadvertent." We are not dealing here with typographical errors. The EPA approved whole provisions some thirteen years ago and then twice approved modifications of the odor provisions without suggesting that odor regulations as a whole are unauthorized. In order for the EPA's 1972 approval of Pennsylvania's odor regulations to have been inadvertent, the EPA's policy at these times would have to have been that odor regulations do not contribute to attainment of the NAAQS and that the Agency would not approve them. The record reveals that no such EPA policy existed in 1972. Not until 1980, when it completed the study of odor regulations requested by Congress, did the EPA adopt the policy that it did not have authority to approve odor regulations submitted as part of SIP's. Thus, in 1979 the EPA approved Pennsylvania's proposed changes to its odor regulations, 44 Fed. Reg. 73,031 (Dec. 17, 1979), but in 1981 and 1982, the EPA declined to approve the odor regulations of Guam, Nevada, and Iowa. We have here a clear change in policy, which thus should not be exempted on the ground that it is a revision. *Detroit Edison* reaches the same result on a change that much more plausibly was the result of a mere oversight.

At oral argument, counsel for the EPA also suggested that § 7410(c) provides authority for the EPA's action on the ground that it was a promulgation of a portion of a SIP. That section states:

> (1) The Administrator shall, after consideration of any State hearing record, promptly prepare and publish proposed regulations setting forth an implementation plan, or portion thereof, for a State if . . . (B) the plan, or any portion thereof, submitted for such State is determined by the Administrator not to be in accordance with the requirements of this section.

45 U.S.C. § 7410(c). Because the EPA does not have to submit such actions first to the state, counsel suggests that by viewing the deletion of odor regulations as a promulgation of a portion of the SIP, we should not find any procedural error.

We note preliminarily that even if we were to agree with the EPA's reading of § 7410(c)(1)(B), the Act still requires the Agency to hold a public hearing before "promulgating" its own portion of the plan. 42 U.S.C. § 7607(1), (5). The Agency concedes that it held no such hearing. That fact itself might require granting the petition. It also suggests that the EPA, as opposed to its counsel, did not consider its actions a plan promulgation under § 7410(c)(1)(B). More importantly, we believe that when the EPA promulgates a SIP for a state because the state's plan does not meet statutory requirements, it must act *before* it has approved the state's plan, not thirteen years later. *See* 42 U.S.C. § 7410(c)(1) (contemplating preparation of a plan by the EPA when the EPA finds a *proposed* SIP unsatisfactory, not a previously approved SIP). Thus, the EPA can issue a portion of a plan to replace one proposed by the state only if it has rejected that portion of the state's plan. *Id.* But under § 7410(a)(2), the EPA can only reject a portion of a plan within four months of its submission, which the EPA did not do. Thus, the EPA's action here is not a promulgation of a portion of a plan within the meaning of § 7410(c).[12]

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12. Although the parties have not cited it, § 7410(i) (enacted by Pub. L. 95-95, § 108(g), 91 Stat. 685 (1977), as subsection 7410(h), and redesignated subsection (i) by Pub. L. 95-190, § 14(a)(5), 91 Stat. 1393 (1977)), may also require granting the petition. That section provides that outside of certain specific statutory methods, "no order, suspension, plan revision, or other action modifying any requirement of an applicable implementation

In sum, the Clean Air Act is a comprehensive statute that attempts to enumerate all of the EPA's powers concerning SIPs. The absence of any other source of statutory authority for modifying a SIP requires that the EPA accomplish its modification through the use of the "revision" provisions. The EPA cannot create a new method of modifying a SIP in order to avoid the label "revision." If the EPA is dissatisfied with a SIP or a portion of it, then it must either initiate the process for revising the SIP or initiate the process for promulgating a new SIP that addresses the deficiencies in the earlier one.

D.

In addition to the specific statutory arguments, the EPA also presents a broader, philosophical argument. It contends that we should not construe the deletion of odor regulations to require initial consideration by Pennsylvania because the EPA "did not direct or limit the power or authority of the state in any way." Resp. Br. at 42. The rules constituting the SIP remain valid state regulations. No new terms or provisions have been added to the SIP by virtue of the final rule, nor are such necessary for the SIP to meet the requirements of § 7410. All that the EPA has done, it claims, is to tell "Pennsylvania what EPA itself cannot do under the Clean Air Act." *Id.* at 43. the "SIP continues to be a creature of the state in the first instance, not of EPA." *Id.* at 41.

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plan may be taken with respect to any stationary source by the State or by the Administrator." Of those permissible methods, the only two possibly relevant here are a plan revision under § 7410(a)(3) or a plan promulgation under § 7410(c). If the SIP modification at issue here is "taken with respect to any stationary source," this section would require that the EPA treat the modification as a revision because we have held that the EPA may not treat it as a plan promulgation.

The SIP change here unquestionably affects stationary sources. Whether it is "taken with respect to" such a source depends on our construction of those words. Because the parties do not address this issue, however, we do not address it. We note, however, that this section appears to confirm what otherwise appears implicit in Part A of the Clean Air Act, namely that the Act attempts to enumerate an exhaustive list of the EPA's powers regarding SIP's. Lacking another statutory source of authority, the EPA must utilize the revision provisions to accomplish its purpose.

We reject this argument, however, because even if the deletion of odor regulations does not impose any requirement on the state, the state is entitled to include in a SIP provisions that go beyond the minimal requirements of the NAAQS. In this way it may impose enforcement obligations on the EPA and on the federal courts. *See Union Electric Co. v. EPA*, 515 F.2d 206, 211 (8th Cir. 1975) *aff'd*, 427 U.S. 246 (1976).[13]

Petitioners have contended that the odor regulations do help to regulate air pollutants that are regulated by NAAQS; petitioners claim that by attacking particular periods of high emissions that cause odors, the odor regulations restrict pollutants in ways not done by the other non-odor regulations, which work more through general averages. While not objecting to the deletion of the odor regulations, the Director of the Pennsylvania Department of Environmental Resources also indicated that the Department considered the odor regulations an adjunct to regulation of ozone and sulfur compounds. *See supra* n.8. The EPA notice itself stated that it might accept "quantifiable, specific odor regulations" that might assist in the control of federally regulated pollutants. 51 Fed. Reg. at 18,440.

Thus, even if the EPA may require Pennsylvania to delete its present odor regulations, Pennsylvania might choose to offer more narrowly tailored regulations that meet EPA requirements or it might wish to compensate for the loss of the odor regulations by strengthening other requirements. Consistent with the structure of the Clean Air Act, Pennsylvania should have had the opportunity to consider the proposed revisions before their promulgation by the EPA.

IV. HARMLESS ERROR

Because the EPA's promulgation of the final rule deleting

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13. We also observe that the import of the EPA's argument is that although the regulations will not be enforced by it, they will be in place and may be enforced by state authorities. However, given that SIPs form an integrated regulatory approach, we are wary of the argument that by declining to enforce certain provisions the EPA has not directed or limited state authority.

all odor regulations from the Pennsylvania SIP was a revision of that SIP, § 7607(d) applies. *See* 42 U.S.C. § 7607(d)(1)(A). Under § 7607(d)(8) this Court cannot reverse an EPA rule because of a procedural error unless the error was "so serious and related to matters of such central relevance to the rule that there is a substantial likelihood that the rule would have been significantly changed if such errors had not been made." 42 U.S.C. § 7607(d)(8). The EPA and the City of Philadelphia, amicus curiae, claim that no such likelihood is present here.

Reviewing courts have found § 7607(d)(8) problematic. As the Court of Appeals for the District of Columbia Circuit has pointed out, this provision originated in the House of Representatives in conjunction with a provision in its 1977 bill requiring the EPA to permit parties to cross-examine witnesses about adjudicative facts. *See Small Refiner Lead Phase-Down Task Force v. EPA*, 705 F.2d 506, 521-23 (D.C. Cir. 1983) (*citing* H.R. 6161, 95th Cong., 1st Sess. § 305(a), § 307(d)(5)(B) (1977), *reprinted in* 4 Environmental Policy Division, Congressional Research Service, *A Legislative History of the Clean Air Act Amendments of 1977*, at 2220, 2431 (Comm. Print 1978). Because the House did not wish to accord such rights in testimony concerning legislative facts and because the House foresaw many possible disputes over whether facts were adjudicative or legislative, the House built in protections to assure that agency rulemaking would not easily be reversed for such reasons.[14] 705 F.2d at 522. When the Conference Committee deleted the cross-examination requirement, it left in the limits on procedural review. "These limits," however, "are not mentioned in either the Conference Report or in the House and Senate debates on the Conference Committee bill. So far as appears, Congress never considered their residual meaning once the right to cross-examination was gone." *Id.*

Because other portions of the legislative record indicated that Congress did not intend to cut back on the procedural

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14. *See generally* Fed. R. Evid. 201 advisory committee's note (discussing legislative and adjudicative facts).

requirements of the Administrative Procedure Act, 5 U.S.C. §§ 551-706 (1982) ("APA"), the *Small Refiner* court concluded that violations of the Clean Air Act that also violate the APA should be reversed. *Id.* at 523, 543-44. Regarding the additional requirements of the Clean Air Act, all the court could conclude was that § 7607(d)(8) "sets a restrictive tone" that the " 'EPA's rulemaking not be casually overturned for procedural reasons.' " *Id.* at 523 (*quoting Sierra Club v. Costle*, 657 F.2d 298, 391 (D.C. Cir. 1981)).

In this case, the EPA's "procedural" violations involve its failure to propose the revisions to the state and the failure to hold a public hearing, either through the state or on its own. *See* 42 U.S.C. § 7410(a)(3)(A), (c)(1). If we were to follow *Small Refiner*, therefore, the denial of a hearing alone would require grant of the petition. *Cf.* 5 U.S.C. § 553 ("When rules are required by statute to be made on the record after an opportunity for an agency hearing," and that hearing is not held, an agency has violated the APA.). Such a result makes particular sense in light of the value of a public hearing reflected in the repeated statutory requirement that all actions affecting SIP provisions occur after a public hearing. *See* 42 U.S.C. § 7410(a)(2) (Administrator shall adopt SIP if it meets other requirements and was adopted after a hearing); § 7410(a)(3)(A) (Administrator shall adopt revision if adopted by the state after reasonable notice and public hearings); § 7410(c)(1) (in promulgating SIP, portion of SIP or revision, Administrator must consider state hearing record, or, if state did not hold hearing, hold hearing); § 7607(d)(5) (in promulgating rules, Administrator must provide opportunity for oral presentations).

We need not rest our decision on this ground alone, however, for we agree with Judge Posner that a failure to propose a revision to a state is far more "than a procedural bobble." *Bethlehem Steel Corp.*, 742 F.2d at 1036. Such a failure bears little similarity to a failure to permit cross-examination, for it goes to the division of authority between the federal government and the state. "The Clean Air Act is an experiment in federalism, and the EPA may not run rough-

shod over the procedural prerogatives that the Act has reserved to the states." *Id.* We hold that such failures simply are not the kinds of procedural errors subject to harmless error review. *Cf. Sierra Club v. Indiana-Kentucky Electric Corp.*, 716 F.2d 1145, 1153-54 (7th Cir. 1983) (SIP promulgated by state in violation of state procedure is invalid even after accepted by EPA).

Even if we were to view the EPA's errors as purely procedural, we find a substantial possibility that proposal of the regulations to the Commonwealth of Pennsylvania might result in differences in the SIP. As we have noted above, *see supra* n.8, resolutions passed by the City Council of Philadelphia and the House of Representatives of the Commonwealth opposed the revision of the odor regulations. The Pennsylvania Department of Environmental Resources also pointed out both that it considered the odor regulations relevant to regulating federally restricted air pollutants and that "problems could arise for the Commonwealth as the result of no EPA backing for the Department's odor control efforts." J.A. at 404a. Although Pennsylvania could propose new regulations today, Congress's requirement that a state hold a public hearing before adopting revisions demonstrates that Congress was aware that hearings influence both the likelihood that decisions will be changed and the substance of the decisions themselves. In short, by fully airing issues, hearings influence the substance of decisionmaking. If faced with its own public hearings, Pennsylvania might very well have proposed regulations that might at least continue some of the effect of its odor regulations. Moreover, Pennsylvania might very well make other requirements in its SIP more stringent to compensate for the loss of odor regulations.

In sum, the requirements for state consideration of revisions and for public hearings before any revision are too basic to the statute for us to consider the failure to follow them harmless.

V. CONCLUSION

For the foregoing reasons, the petition for review will be granted and the case remanded to the EPA for proceedings consistent with this opinion.

A True Copy:
Teste:

Clerk of the United States Court of Appeals
for the Third Circuit

No. 88-143

IN THE

Supreme Court of the United States

October Term, 1987

THE CITY OF PHILADELPHIA, and
JAMES STANLEY WHITE, in his capacity as
MANAGING DIRECTOR, and
WILLIAM J. MARRAZZO, in his capacity as
WATER COMMISSIONER,

Petitioners,

v.

CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE THIRD CIRCUIT

BRIEF IN OPPOSITION OF CONCERNED CITIZENS OF BRIDESBURG, et al.

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COUNTER-STATEMENT OF PETITIONERS QUESTIONS

1. Whether petitioners' challenge to subject matter jurisdiction was made moot when plaintiffs' federal claim was judicially determined to have been in effect continuously throughout the litigation.

2. Whether the City of Philadelphia is immunized from monetary civil contempt sanctions imposed by a federal court.

TABLE OF CONTENTS

TABLE OF AUTHORITIES

TABLE OF AUTHORITIES—*(Continued)*

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CONCERNED CITIZENS OF BRIDESBURG, et al.,

Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Third Circuit

BRIEF IN OPPOSITION OF CONCERNED CITIZENS OF BRIDESBURG, et al.

Respondents, Concerned Citizens of Bridesburg, et al., respectfully request the Court deny the petition for a writ of certiorari seeking review of the judgment and opinion of the United States Court of Appeals for the Third Circuit reported at 843 F.2d 679 (3d Cir. 1988) which is reproduced in petitioner's appendix at A-1 to A-9.

COUNTER-STATEMENT OF THE CASE

Concerned Citizens of Bridesburg et al. on January 3, 1985 filed a citizen lawsuit pursuant to the Clean Air Act, 42 U.S.C.

§ 7604, to enjoin the Water Department of the City of Philadelphia ("City") from operating its Northeast Water Pollution Control Plant ("N/E WPCP") in violation of the odor regulations in the Pennsylvania State Implementation Plan ("SIP"), 40 C.F.R. 52.2020 et seq.

The City moved to dismiss contending the odor regulations in the Pennsylvania SIP were invalid and unenforceable. After extensive briefing the district court issued a comprehensive opinion denying the City's motion. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, C.A. No. 85-14 (E.D. Pa. 4/23/85).[1]

The City then filed a Petition for Review against the EPA, pursuant to 42 U.S.C. § 7607(b), seeking to invalidate the EPA action that had incorporated the odor regulations into the Pennsylvania SIP. 38 Fed Reg 32893 (11/28/73). The Court of Appeals dismissed the City's Petition for Review because it had been filed after the time period allowed by 42 U.S.C. § 7607(b). *City of Philadelphia v. United States Environmental Protection Agency*, No. 85-3285 (3rd Cir. 8/22/85).[2] The City did not seek a writ of certiorari to challenge the Court of Appeals decision.

Trial on the merits of the Concerned Citizens of Bridesburg lawsuit was held from May 5 to May 8, 1986. After trial, while the district court decision was pending, the EPA published a rule deleting the odor regulations from the Pennsylvania SIP, 51 Fed Reg. 18438 (5/20/86).

The District Court judgment was filed July 28, 1986. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, 643 F. Supp. 713 (E.D. Pa 1986) (A-24).[3] The court noted that EPA's deletion of the odor regulation removed plaintiff's federal claim but that it did not remove the court's jurisdiction to decide the pendent state common law claim of maintaining a public nuisance. (A-48, A-50-51).

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1. Petitioner neglected to include the district court opinion of April 23, 1985 in the Appendix.

2. Petitioner also neglected to include the Third Circuit Dismissal of the City Petition in the Appendix.

3. References are to Appendix prepared by Petitioner.

The district court held that the City was maintaining a public nuisance as evidenced by the numerous malodorous emissions from the N/E WPCP that were causing substantial harm, injury, annoyance and discomfort to the residents in the area of the N/E WPCP in violations of the odor regulations under Pennsylvania law. (A-54, A-55). By way of remedy the court, inter alia, enjoined defendants from operating the N/E WPCP in violation of the state odor regulations (A-56).

The district court order of July 28, 1986 was a final judgment from which the City could have appealed. On appeal the City could have challenged the jurisdictional issues considered and decided by the final judgment including the district court's April 23, 1985 opinion declaring the odor regulations in the Pennsylvania SIP to be enforceable regulations. The City, however, did not appeal from the July 28, 1986 final judgment.

Several months after the July 28, 1986 court injunction, Concerned Citizens of Bridesburg moved to declare defendants in civil contempt because of the repeated violations of the injunction. Following a 3 day hearing, the district court, on January 28, 1987, filed an opinion and order declaring the City to be in civil contempt and imposing civil contempt sanctions to coerce defendants into compliance. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, C.A. 85-14 (E.D. Pa. 1/28/87) (A-12). The sanctions, inter alia, required defendants to pay monetary penalties into the Registry of the Court for future violations of the injunctions, these funds to be available to compensate plaintiffs for actual losses due to the city's violations. (A-19, A-20).

Defendants appealed the contempt judgment of January 28, 1987. The appeal, essentially, challenged the jurisdiction of the district court, though defendants had failed to appeal the underlying judgment of July 28, 1986 which had considered and ruled on all of the jurisdictional issues.

Defendants also appealed the contempt judgment in respect to the monetary contempt sanctions imposed by the district court.

While the City's appeal of the contempt order was pending, the Court of Appeals invalidated EPA's rule deleting the odor

regulations. *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F2d 777 (3rd Cir. 12/18/87). (A-96) The EPA did not seek a writ of certiorari to challenge the decision.

Thereafter, the district court's contempt order of January 28, 1987 was affirmed. *Concerned Citizens of Bridesburg v. Philadelphia Water Department*, 843 F2d 679 (3rd Cir. 3/31/88) (A-1). The Court of Appeals held that the City's challenges to jurisdiction had been made moot by the court decision invalidating the EPA rule, (A-6, A-7).

The Court of Appeals also rejected the City's arguments in respect to the monetary sanctions imposed by the district court to coerce compliance with the July 28, 1986 injunction (A-8, A-9).

Reasons for Denying the Writ

SUMMARY

The petition for a writ of certiorari presents no questions of significance or importance. The decision of the Court of Appeals was unanimous and clearly correct. The petition for a writ should be denied.

The principal issue raised by the petition for a writ concerns jurisdiction. The district court judgment of July 28, 1986 (A-24) considered and decided all the jurisdictional issues. The district court had ruled that federal subject matter jurisdiction existed at the outset of the case by reason of the substantial allegations that defendants were violating the odor regulations in the Pennsylvania State Implementation Plan (SIP) under the Clean Air Act; that the federal claim had been removed after trial on the merits but prior to the July 28, 1986 judgment, by reason of the EPA rule of May 20, 1986 deleting the odor regulations from the Pennsylvania SIP, but the district court had maintained jurisdiction to decide the pendant state common law claim of maintaining a public nuisance.

Had the defendants appealed from the July 28, 1986 judgment they could have had a judicial review of all the jurisdictional matters concerned with pendent jurisdiction and

with the enforceability of the odor regulations in the Pennsylvania SIP. The defendants, however, chose not to file an appeal.

These jurisdictional issues, however, were raised by defendants on their appeal of the civil contempt order issued six months later, on January 28, 1987. When the Court of Appeals came to decide the appeal the material facts had changed. By then, the EPA's rule deleting the odor regulations had been invalidated and nullified by the Court of Appeals (A-96). Thus the federal claim providing jurisdiction had been restored as though it had existed continuously throughout the litigation.

The odor regulations in the Pennsylvania SIP have never been invalidated by a state court or a federal court; nor has any state court or federal court ever found that the odor regulations had been invalidly incorporated into the Pennsylvania SIP. These odor regulations in the SIP, therefore, are regulations that may be enforced by citizen lawsuits under the Clean Air Act.

The Third Circuit decision affirming the contempt order of January 28, 1987 stands for the proposition that SIP provisions may be enforced by citizen lawsuits under the Clean Air Act. It is not in conflict with the Seventh Circuit which held that a SIP provision is not enforceable if it has been ruled to be invalid by a state court.

The defendant's contention that the federal district court is barred from imposing monetary civil contempt sanctions on the City of Philadelphia by reason of a State tort liability act misconstrues the nature of a contempt sanction and suggests that federal courts are without power to enforce their own decrees against a Pennsylvania municipality. Defendant's contention is incorrect.

I. Subject Matter Jurisdiction Has Existed Throughout This Litigation.

A. Odor Regulations in the Pennsylvania SIP Furnish Subject Matter Jurisdiction

The citizen lawsuit brought by Concerned Citizens of Bridesburg derives jurisdiction from 28 U.S.C. § 1331 because

the case arises from the Clean Air Act, 42 U.S.C. § 7401 et seq. and from the citizen lawsuit provision, 42 U.S.C. § 7604, of the Clean Air Act.

The complaint alleged that the City was operating its N/E WPCP in violation of the odor regulations in the Pennsylvania SIP, 40 CFR 52.2020 et seq., which had been incorporated into the Pennsylvania SIP in 1973 by the EPA pursuant to 42 U.S.C. 7410. 38 Fed. Reg. 32893 (11/28/73)

Provisions of a SIP are emission standards or limitations, 42 U.S.C. § 7604(f), which are enforceable under the federal-state-private enforcement scheme of the Clean Air Act, *Illinois v Celotex Corporation*, 516 F. Supp. 716, 717 (C.D. Ill. 1976); *Citizens Association of Georgetown v. Washington*, 383 F.Supp. 136, 139 (D.D.C. 1974). See *Train v. NRDC*, 421 U.S. 60, 92 (1975). Jurisdiction was established here by substantial allegations that defendants were violating the odor regulations in the Pennsylvania SIP promulgated by the EPA. Since the action arises out of alleged violations of federal law, jurisdiction is provided by 28 U.S.C. § 1331. Since plaintiffs provided 60 day notices of intent to sue jurisdiction is also provided by 42 U.S.C. § 7604.

Defendants contend, however, that the odor regulations in the Pennsylvania SIP are not enforceable under the Clean Air Act. This contention was rejected by the district court, in a comprehensive opinion, because defendants could not demonstrate that the odor regulations were wholly unrelated to EPA's ambient air quality standards. *Concerned Citizens of Bridesburg v. Philadelphia Water Dept.*, C.A. No. 85-14 (E.D. Pa. 4/23/85). See *Friends of the Earth v. Potomac Electric Power Co.*, 419 F.Supp 528, 533-34 (D.D.C. 1976).

The City then challenged the validity of the EPA action, 38 Fed. Reg. 32893 (11/28/73), that had incorporated the odor regulations into the Pennsylvania SIP. The City filed a Petition for Review, pursuant to 42 U.S.C. 7607(b), against the EPA but the Court of Appeals dismissed, on the motion of the EPA, because the City's Petition for Review had been filed beyond the

time provided by the Clean Air Act. *City of Philadelphia v. United States Environmental Protection Agency* No. 85-3285 (3d Cir. 8/22/85).

In sum, the odor regulations in the Pennsylvania SIP existed when the complaint was filed. The violations of these regulations provided jurisdiction pursuant to 28 U.S.C. § 1331 and 42 U.S.C. § 7604. These odor regulations are valid and enforceable under federal law; no court has ever ruled otherwise.

B. The Odor Regulations In the Pennsylvania SIP Have Continued To Exist Throughout the Litigation

Trial on the merits of plaintiffs complaint was held May 3 through May 8, 1986. After trial but prior to the issuance of the court judgment, the EPA published a rule that deleted the odor regulations from the Pennsylvania SIP. 51 Fed. Reg. 18438 (5/20/86).

Thereafter, on July 28, 1986, the district court issued its judgment (A-24). Noting EPA's rule the district court recognized that the federal claim no longer existed but the court exercised its discretion to maintain jurisdiction in respect to the pendent state common law claim of maintaining a public nuisance (A-48-51). The court found that the malodorous emissions from the N/E WPCP were in violation of state odor regulations and that such violations constituted a public nuisance. The district court, therefore, issued an order (A-56) enjoining the defendants from any further violation of the state odor regulations.[4]

Concerned Citizens of Bridesburg, challenged EPA's rule deleting the odor regulations. This challenge, pursuant to 42 U.S.C. § 7607(b) of the Clean Air Act, was upheld in *Concerned Citizens of Bridesburg v. United States Environmental Protection Agency*, 836 F2d 777 (3d Cir. 12/18/87) (A-96, A-118). The effect of this decision was to nullify the EPA rule thereby restoring the validity of the odor regulations in the Pennsylvania

4. The state odor regulations found to have been violated by the district court are the exact same odor regulations that are in the Pennsylvania SIP.

SIP as though EPA had never issued the rule. See *United States v. Larionoff*, 431 U.S. 864, 873, n.12 (1977), *Manhattan General Equipment Co. v. Commissioner*, 297 U.S. 129, 134 (1936).

The decision invalidating the EPA rule was issued while defendants' appeal of the contempt order was under consideration by the Court of Appeals. The Court of Appeals took note of that decision; correctly recognized that it made the defendant's arguments regarding jurisdiction moot and affirmed the district court's contempt order. (A-6, A-7).

The odor regulations in the Pennsylvania SIP which existed at the initiation of the complaint continued to exist throughout the litigation and continued to provide federal jurisdiction.

C. Petitioners Are Precluded From Collateral Attack on the Contempt Judgment

The district court judgment of July 28, 1986 enjoined defendants from operating the N/E WPCP in violation of the odor regulations under Pennsylvania's Air Pollution Control Act, 35 P.S. § 4001 et seq, and under the Philadelphia Air Management Code (A-56). It was a final order that could have been appealed. Since the judgment of July 28, 1986 and the prior interlocutory opinion of April 23, 1985 considered and ruled on the City's jurisdictional objections, the City had the opportunity to have appellate review of these issues by an appeal of the July 28, 1986 judgment. The City chose not to appeal.

However, when the district court declared the defendants to be in civil contempt, on January 28, 1987 (A-21) and imposed a civil contempt sanction (A-22, A-23) the City did appeal and the principal issue raised by the City concerned the matter of jurisdiction.

The Court of Appeals recognized that the City's challenge to jurisdiction in the appeal of the contempt order was a collateral attack on the contempt order (A-6, A-7) but the Court had no reason to consider the propriety of the City's argument because the invalidation of the EPA rule had restored the federal claim on which original jurisdiction was based. (A-7)

Whether subject matter jurisdiction can be used to collaterally attack a subsequent contempt order by a party that had failed to bring a direct appeal poses the problem of balancing judicial concern for finality of judgments against judicial concern for the validity of judgments. The modern trend gives substantially greater weight to the concern for finality. *Hodge v. Hodge*, 621 F2d 590, 592 (3d Cir. 1980). Restatement (Second) Judgments, § 12, Comment C.

Greater concern for finality is also evidenced in *Chicot County Drainage District v. Baxter State Bank*, 308 U.S. 371 (1940) where Chief Justice Hughes declared:

> "The [district] court has the authority to pass upon its own jurisdiction and its decree sustaining jurisdiction against attack, while open to direct review, is res judicata in a collateral action."

308 U.S. at 377. See *Gould v. Mutual Life Insurance Co. of New York*, 790 F2d 769, 774 (9th Cir. 1986).

In *Insurance Corp. of Ireland, Ltd. v. Campagnie des Bauxite de Guinee*, 456 U.S. 694 (1982) the Supreme Court declared:

> "A party that has had an opportunity to litigate the question of subject matter jurisdiction may not, however, reopen that question in a collateral attack upon an adverse judgment. It has long been the rule that the principles of res judicata apply to jurisdictional determinations — both subject matter and personal." (citation omitted)

Id., 456 U.S. at 702 n.9.

The City's failure to take a direct appeal of the July 28, 1986 judgment precludes the city from collaterally attacking the contempt judgment of January 28, 1987. The sustained existence of the odor regulations in the Pennsylvania SIP makes the City's jurisdictional arguments moot, whether or not they could assert a collateral attack.

D. There is no Conflict Between the Third Circuit and the Seventh Circuit

The City has attempted to create a conflict between the Third and Seventh Circuits in respect to the enforceability of SIP provisions. No such conflict exists.

Sierra Club v. Indiana-Kentucky Electric Corp., 716 F2d 1145 (7th Cir. 1983), affirmed a district court order dismissing a Clean Air Act citizen lawsuit because the SIP provision at issue had been invalidated by an Indiana State court. The Seventh Circuit correctly reasoned that if the provision had been invalidly adopted by the State it was a nullity ab initio and therefore, could not be enforced though it had been incorporated by the EPA into the Indiana SIP.

In contrast to the Seventh Circuit case, the Third Circuit affirmance of the January 28, 1987 contempt order concerned provisions of the Pennsylvania SIP which had been validated by the courts on numerous occasions. No state court or federal court had ever declared the odor regulations to be invalid, nor had any court invalidated the procedure by which the regulations had been incorporated into the Pennsylvania SIP.

The Third Circuit held that a SIP provision that had not been invalidated by any court is a provision that is enforceable through a Clean Air Act citizen lawsuit. The Seventh Circuit held that a SIP provision judicially declared to be invalid by a State Court is a SIP provision that could not be enforced by a Clean Air Act citizen lawsuit. There is no conflict between these decisions.[5]

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5. It should be noted that the district court judgment of July 28, 1986, which was issued when the EPA rule deleting the odor regulations from the SIP was apparently in effect, did not enjoin defendants from violating the odor regulations in the Pennsylvania SIP. Instead, the injunction prohibited defendants from violating the odor regulations under the Pennsylvania Air Pollution Act and the Philadelphia Air Management Code (A-56).

II. The District Court Is Not Barred From Imposing Monetary Civil Contempt Sanctions Against the City of Philadelphia

The district court contempt order of January 28, 1987 requires the City, inter alia, to pay monetary penalties into the Registry of the Court for repeated violations of the court injunctions. (A-21, A-22) These monetary penalties are to be paid into a special fund which may be used to compensate named plaintiffs who can demonstrate, by clear and convincing evidence, actual losses due to the City's violations of the injunction. (A-19, A-20)

The City contends these sanctions violate the provisions of Pennsylvania's Political Subdivision Torts Claims Act, 42 Pa. C.S.A. § 8541 et seq. (A-88) and therefore, the City argues that the contempt sanctions are invalid. The City is incorrect, they have misconstrued the nature of the civil contempt sanctions.

The district court has wide discretion to fashion a civil contempt sanction to compel defendants to undertake the necessary actions required by a court's injunction. A contempt sanction seeks to correct a defendants' conduct to prevent future violations of a court order. *Delaware Valley Citizens Council for Clean Air v. Commonwealth of Pennsylvania*, 533 F.Supp. 869 882 (E.D. Pa 1982); *aff'd*, 678 F2d 470 (3d Cir. 1982); *cert den.* 459 U.S. 969 (1982); *In re Arthur Treacher's Franchise Litigation*, 689 F2d 1150, 1158 (3d Cir. 1982).

The contempt sanction is prospective in nature. It is not imposed in response to a tort claim. See *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1946); *Quinter v. Volkswagon of America*, 676 F2d 969, 975 (3d Cir. 1982). Therefore, the Tort Claims Act is not relevant or applicable to a federal court contempt sanction.

If the Tort Claims Act immunized the City from the contempt sanction it would frustrate the court's ability to enforce federal court orders against contumacious municipalities. This would violate the Supremacy Clause of the United States Constitution Article VI § 2.

It is well recognized that a court may award damages to persons incurring losses that result from acts in violation of court

injunctions. *United States v. United Mine Workers*, 330 U.S. 258, 303-04 (1946), *Quinter v. Volkswagon of America*, 676 F2d 969 (3rd Cir. 1982).

These damage awards are not awards for losses due to tortious actions, they are awards for losses due to actions in violation of court orders. Therefore, the Tort Liability Act is not relevant or applicable to such damage awards.

The civil contempt sanctions imposed by the district court here do not conflict or violate the Pennsylvania Political Subdivision Tort Liability Act. The Court of Appeals was correct in affirming the district court order (A-8, A-9).

CONCLUSION

For the reasons set forth *supra*, Concerned Citizens of Bridesburg et al. respectfully request the Supreme Court of the United States deny the Petition for a Writ of Certiorari to review the opinion and decision of the Court of Appeals for the Third Circuit.

Respectfully submitted,

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